

No. 11766

United States
Circuit Court of Appeals
For the Ninth Circuit

see vol. 2501

BURNHAM CHEMICAL COMPANY, a corporation,
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Appellant,

vs.

BORAX CONSOLIDATED, LTD., a corporation,
PACIFIC COAST BORAX COMPANY, a
corporation, UNITED STATES BORAX
COMPANY, a corporation, and AMERICAN
POTASH & CHEMICAL CORPORATION,
Appellees.

Transcript of Record
IN TWO VOLUMES
VOLUME II
Pages 451 to 824

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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GEORGE B. BURNHAM,

recalled.

Cross-Examination
(Resumed)

Mr. Harrison: Shall we proceed, your Honor?

The Court: Yes, go right ahead.

Q. (By Mr. Harrison): Mr. Burnham, when Court adjourned yesterday, we were talking about your amended complaint in the suit brought in Carson City before the District Court to enjoin the enforcement of the fraud order, you recall that, do you not? A. Yes.

Q. You recall also the fact, do you not, that when you filed that amended complaint you had attached to it several exhibits? A. Yes.

Mr. Harrison: I have now, Mr. Carr, certain certified copies of three of these exhibits, certified to by the Clerk of the District Court and I offer them in evidence.

Mr. Carr: May I see them?

Mr. Harrison: Yes, surely.

Mr. Carr: This is one; they are not all three together.

Mr. Harrison: I offer in evidence, if the Court please, a certified copy, certified by the Clerk of the District Court for the District of Nevada of an exhibit attached to the amended complaint already introduced in evidence in this case, consisting of a letter to Mr. Floyd McEan from Burnham Chemical Company by G. B. Burnham, dated October, 1923, and I offer that in evidence as Defendants' Exhibit next in order.

(Testimony of George B. Burnham.)

Mr. Carr: October 6—what year? [139]

Mr. Harrison: 1923.

Mr. Carr: We renew our objection.

The Court: This is an exhibit to the complaint already in evidence?

Mr. Harrison: Yes, this is an exhibit to the complaint already in evidence, your Honor.

The Court: Very well, I will overrule the objection.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit D.)

Q. (By Mr. Harrison): Now, Mr. Burnham, you recall the fact that this letter which I now show you was an exhibit to the amended complaint in that suit, do you not?

A. I haven't looked over the letter for a long time.

Q. Well, it is so certified by the Clerk of the Court. A. All right.

Q. I will ask you to look at it and ask you if it is not a fact that that is a copy of a letter which you addressed under its date to Mr. McEan?

A. It is a copy, since I must have written it, because it is certified to.

Q. And you did write it, according to your best recollection—that is the original of that letter on its date? A. Yes.

Q. Now, this letter is addressed to Mr. Floyd McEan, Post Office Inspector, at Reno, Nevada, and

(Testimony of George B. Burnham.)

is dated October 6, [140] 1923. At that time Mr. McEan was the post office inspector at Reno, Nevada, was he not? A. Yes.

Q. And the Burnham Chemical Company at that time was under investigation by the Post Office, was it not? A. Yes.

Mr. Harrison: I will read two paragraphs of the letter, and Mr. Carr can read anything else he wishes.

I am calling your attention, Mr. Burnham, to these two paragraphs:

“However, the success of our enterprise is not looked upon with favor by our potash and borax competitors. Our chief competitor who is said to be controlled by the Borax Consolidated of London, England, would be seriously affected should we produce borax at \$5 per ton. They have therefore taken steps to hinder our development as shown by the 3100-acre reservoir site for Solar Evaporation Searles Lake brine, which was applied for by the San Bernardino Borax Mining Company and protested against to the Commissioner of the General Land Office by the Federal Lessees at Searles Lake.

“We have reason to believe that there are unseen forces at work tending to hinder the financing of our enterprise and yet we believe the cooperation of the Government in assisting us in our financing is a matter of mutual [141] interest.”

(Testimony of George B. Burnham.)

Now, calling your attention to this particular sentence: "The success of our enterprise is not looked upon with favor by our potash and borax competitors"—I will ask you to whom you intended to refer by those words, "our potash and borax competitors"?

A. The American Trona Company and the Pacific Coast Borax Company, and possibly some other of our competitors.

Q. Well, I think you said yesterday that the American Trona Company was the former name of the American Potash & Chemical Corporation; that is correct, is it not? A. Yes.

Q. In the next sentence you say, "Our chief borax competitor, who is said to be controlled by the "Borax Consolidated of London, England, would be seriously affected".

To whom did you refer as your "chief borax competitor"?

A. Pacific Coast Borax Company.

Q. In referring to the fact that "they have taken steps to hinder our development", whom were you referring to as "they", the persons who had taken steps to hinder your development?

A. I felt there was ruthless competition going on.

Q. I am asking you——

A. Yes, the Pacific Coast Borax.

Q. The Pacific Coast Borax? A. Yes.

(Testimony of George B. Burnham.)

Q. Now, then, you say in the next paragraph:

“We have reason to believe that there are unseen forces at work tending to hinder the financing of our enterprise”.

To whom did you refer as the “unseen forces”?

A. I don't remember what I had in mind at that time.

Q. Haven't you any idea at the present time what you had in mind?

A. Well, I presumed our competitors would be one of the unseen forces.

Q. They were some of the “unseen forces,” at least, what you had in mind when you wrote that letter?

A. Yes, in normal competition one would naturally expect your competitors would not want to see you go ahead.

Q. But competitors are seen forces, ordinarily, are they not? Are they not?

A. Yes, of course, but I had no knowledge that there was any laws being violated or any conspiracy whatsoever.

Q. But you considered that at that time in 1923 these defendants, the Pacific Coast Borax and the American Trona were trying to hinder your development, did you not?

A. I am not sure when I wrote that letter just exactly what I had in mind.

Q. You are not sure to whom you referred as the “unseen forces”?

(Testimony of George B. Burnham.)

Mr. Carr: He did not say that. [143]

Mr. Harrison: Well, I will withdraw that question.

Q. Are you sure, or reasonably sure at the present time what you had in mind when you referred to those "unseen forces"?

A. I had no doubt in mind that one of the "unseen forces" was no doubt our competitors.

Mr. Harrison: We offer in evidence a copy of a letter of October 22, Mr. Carr. Have you seen that?

Mr. Carr: Let me see that.

Q. (By Mr. Harrison): Referring again to that matter of the "unseen forces," you had at that time what other unseen forces in mind than the Pacific Coast Borax and the American Trona Company? A. I don't remember.

Q. Did you testify in your deposition that you made some reference to the "Blue Sky Commissioner"?

A. Some of the states did not like the idea of our mailing literature into their states, and therefore they were protesting our mailing or soliciting the sale of our stock in their states by mail.

Q. Where was your company organized?

A. In Nevada.

Q. Where did you live? A. In Nevada.

Q. And where was your property located?

A. On the California desert. [144]

Mr. Harrison: I offer this letter of October 22, this letter to Mr. McEan which is also exhibit—

(Testimony of George B. Burnham.)

Mr. Carr: Same objection as made to the previous offers on all phases.

The Court: Same ruling.

(The letter in question was thereupon received in evidence and marked Defendants' Exhibit E.)

Q. (By Mr. Harrison): Mr. Burnham, this letter of October 22, 1923, which the Clerk has just marked as Defendants' Exhibit E, and which was an exhibit to your amended complaint in the suit in Nevada, was mailed about its date to Mr. McEan, was it not?

A. Yes, since this is a certified copy of the documents that accompanied the amended complaint in the Post Office.

Mr. Carr: What was that? I can't hear you, Mr. Burnham.

The Witness: A. This seems to me, as far as I can tell, a copy of my letter.

Q. (By Mr. Harrison): And you signed the letter?

A. I must have.

Q. And then also at the date of that letter the Post Office investigation was in progress?

A. Yes.

Mr. Harrison: I will read one paragraph only from this letter.

Q. By the way, this letter followed an inquiry from Mr. McEan [145] the Post Office Inspector, for a list of your stockholders, did it not?

A. I don't remember.

(Testimony of George B. Burnham.)

Q. Well, will you just glance at it?

A. Yes, I see it does.

Mr. Harrison: Now, I will read this paragraph and Mr. Carr can read anything else he wishes:

“Owing, however, to the present active opposition of parties interested in preventing us from succeeding with our enterprise, we hesitate at this time to furnish anyone other than the Department of the Interior with a list of our stockholders.”

Who were the parties interested in preventing you from succeeding, that you referred to in that letter?

A. I presume that one of them would be our competitors.

Q. The American Trona Company and the Pacific Coast Borax Company?

A. Possibly one or possibly the other.

Mr. Carr: May I have a stipulation or an order that my objection goes to all this line of questioning in reference to the mail fraud, your Honor?

The Court: I don't know what you mean by that.

Mr. Carr: Well, I will object individually and separately, then, if your Honor please.

The Court: You made an objection to the introduction of [146] this letter and I overruled it. I think that would cover what you have in mind. I don't want to rule in the dark.

(Testimony of George B. Burnham.)

Mr. Carr: Very well, I will make my objections separately.

The Court: I think it would be better if you have something special in mind.

Mr. Carr: Very well, I will do so. I just didn't want to keep jumping up here and making objections.

Q. (By Mr. Harrison): Now, you refer in this letter, Mr. Burnham, to the "present active opposition of these parties." What led you to believe, or what had occurred that led you to believe that these parties were actively opposing you at that time? What had they done to lead you to believe that?

A. Well, I had heard through hearsay that American Potash & Chemical Company had ridiculed our process.

Q. Had what?

A. Had ridiculed our process.

Q. Had ridiculed your process?

A. Yes, but I presumed that was just normal competition or what you might call a little ruthless competition.

Q. Didn't you know also and didn't you have in mind when you wrote these letters that you had been discharged by the Pacific Coast Borax Company some years before? A. Yes.

Q. Didn't you, when you were discharged, feel bitter about that? [147]

A. Yes, I was very much disappointed about it.

(Testimony of George B. Burnham.)

Q. Did you feel they had broken faith and they had broken an agreement with you?

A. Yes, I felt they were going to finance my lease at Searles Lake, but they wouldn't do it.

Q. You had felt they had broken faith with you and were untrustworthy because they had broken what you believe was an engagement to finance you, is that correct?

A. But they were willing to enter into an agreement to square things up and that was agreeable to me and so that was all taken care of and settled.

Q. Did you feel dissatisfied after that time in the early 20's when they refused to finance you?

A. As long as they returned to me my process I was satisfied.

Q. So you felt perfectly satisfied about that, did you?

A. I was satisfied——

Q. After they had——

Mr. Carr: Let him finish.

Mr. Harrison: Excuse me.

Q. Go ahead, Mr. Burnham: have you finished?

A. After I had got released from them and they had returned to me my patented process and I was free to go ahead and seek capital to go ahead and develop my lease,—I was satisfied.

Q. I will ask you if you testified on your deposition as follows: (addressing Mr. Carr:) This is on Page 133, Line 15, [148] Mr. Carr:

“Q. How long did you continue to feel bitter about it”

(Testimony of George B. Burnham.)

That was "bitter" about your being discharged by the Pacific Coast Borax Company.

Mr. Carr: There is no such evidence.

Mr. Harrison: He so stated this morning.

Mr. Carr: Pardon me, you asked him and there is no such evidence.

The Court: Let's not argue, gentlemen. If there is an objection, state it, and I will rule.

Mr. Carr: We object on the ground there is no such evidence.

Mr. Harrison: I will withdraw the question and put it in this form:

Q. Did you testify as follows on your deposition:

"Q. How long did you continue to feel bitter about it?

"A. Well, until they returned—until they gave me an absolute cancellation of the agreement and returned to me my process.

"Q. When was that?

"A. About the fall of 1919, or perhaps it was in 1920.

"Q. Well, then, how does it happen that in 1933——"

Mr. Carr: "1923."

Mr. Harrison: Yes, "How does it happen that in 1923 you considered that an act of opposition when they had already [149] recognized your rights?

(Testimony of George B. Burnham.)

“A. Under our agreement they were to spend money to develop our process—my process, excuse me, and it was our understanding they would finance my lease at Searles Lake, but they refused to go ahead with my agreement and I had to finance the lease myself.”

Q. Did you so testify? A. Yes.

Q. Did you also testify as follows immediately after that:

“Q. And so when you got the letter referred to already, you felt strongly that these competitors would do anything they could to prevent the success of your company?

“A. I felt that the competitors were trying to prevent me from going ahead, but I had no knowledge of, or no definite information on the matter.”

Did you so testify?

A. Yes.

Q. And that was the truth?

A. Yes, I realized that there was competition—keen and severe competition.

Q. As a matter of fact, didn't you in the amended complaint, Mr. Burnham, complain of the acts of the Pacific Coast Borax Company with respect to the financing and the alleged breach of agreement in 1919?

Mr. Carr: Show him the complaint. [150]

Mr. Harrison: Yes, sir.

(Testimony of George B. Burnham.)

Q. I will call your attention to Page 76 of the amended complaint reading as follows:

“On August 25, 1919, the Pacific Coast Borax Company and the Solvay Process Company unlawfully terminated the employment of Mr. Burnham, as hereinbefore stated; but thereafter unlawfully claimed and asserted the right to retain all of the privileges of said contracts, including the right to use the Burnham Solar Process and the restriction upon the right of Mr. Burnham concerning the development of his lease from the Government.”

Mr. Carr: What page and what line?

Mr. Harrison: That is Page 76.

Mr. Carr: What line?

Mr. Harrison: Beginning at Line 3.

“They refused to extend financial aid to Mr. Burnham to develop his lease, or his process, and at the same time precluded him from securing financial assistance elsewhere. The controversy between the parties was adjusted in March, 1920, all of Mr. Burnham’s rights restored and all asserted rights released, by the Pacific Coast Borax Company and the Solvay Process Company, as hereinbefore stated.”

Q. You recall that you made that charge in the amended complaint, do you not, Mr. Burnham?

A. Yes. [151]

(Testimony of George B. Burnham.)

Mr. Harrison: I now offer in evidence a letter of October 12, 1923. While Mr. Carr is looking at that, may I see those last exhibits, Mr. Clerk?

The Clerk: Yes.

Q. (By Mr. Harrison): Do you recall on your deposition, Mr. Burnham, you were asked some questions about these letters?

A. I don't recall. What page in the deposition?

Mr. Harrison: Page 131, if you have it there.

Mr. Carr: You'd better take your deposition and look at it, Mr. Burnham—your copy of it.

The Witness: 131?

Mr. Harrison: Yes.

The Witness: Yes, I have it here.

Mr. Harrison: I will ask you if you testified on February 25 of this year with respect to these letters as follows, referring to the language of these letters:

“Q. By ‘competitors’ you again mean the American Potash & Chemical Company and the Pacific Coast Borax Company?

“A. Yes.

“Q. And their associate companies.

“A. And their associate companies, yes.

“Q. All of the people whom you have sued as defendants in the present action?

“A. Yes.

“Q. All of these corporations? [152]

“A. Yes.

“Q. You state here that there was active opposition by your competitors and you state that

(Testimony of George B. Burnham.)

in an affirmative manner. You actively believed then that your competitors were so trying to injure you that you were taking precautions that the list of your stockholders should remain confidential, is that correct?

"A. Well, at no time did we have any concrete information that they were injuring us.

"Q. But your belief and suspicion on that was of long standing?

"A. It was strong enough to prevent us from giving our stockholders' lists to anybody.

"Q. And that suspicion and belief went back to these dates in 1923?

"A. Yes, but with no absolute knowledge on the subject."

You so testified, did you not? A. Yes.

Q. And that was the truth? A. Yes.

Mr. Harrison: We offer in evidence this letter of October 12, 1923.

Mr. Carr: Same objection, if your Honor please.

The Court: Same ruling.

Mr. Carr: It was the letter also attached to the amended complaint? [153]

Mr. Harrison: Yes, it is.

(The letter in question was thereupon received in evidence and marked Defendant's Exhibit F.) [154-A]

Q. This is a letter of October 12, 1923 to Mr. Thomas Varley. Who was Mr. Varley?

(Testimony of George B. Burnham.)

A. Mr. Varley was with the United States Bureau of Mines in Salt Lake City.

Q. He had been delegated, had he not, in connection with the investigation by the Post Office that was being carried on in 1923?

A. He was appointed by the Department of the Interior to make the investigation.

Q. For the Post Office Department.

A. Yes.

Q. You signed that letter and sent it on?

A. Without reading it over, I noticed it is certified to by the clerk, and therefore it must be a true copy of my letter.

Q. I call your attention to this paragraph in the letter to Mr. Varley:

“Our potash and borax competitors do not look with favor upon the position of our making potash and borax at such a low figure. In fact, we have reason to believe that there are influences apparently at work against the development of these Government borax and potash deposits at Searles Lake, which make it exceedingly difficult to finance our enterprise.”

By “our potash and borax competitors” you refer to these defendants, did you not? [154]

A. I presume I had them as some of the people I had in mind, yes.

Q. Whom else did you have in mind except these defendants at that time?

A. There were other producers on Searles Lake.

(Testimony of George B. Burnham.)

Q. Did you have in mind that any other competitors were actively doing anything to injure you?

A. No, I had no knowledge on the subject at all.

Q. Did you suspect that anybody else was doing anything to injure you?

A. Sometimes I wondered.

Q. What other competitor did you suspect was doing anything to injure you?

A. It might have been the West End Chemical Corporation.

Q. Did you suspect that the West End Chemical Corporation had ever exerted any influence against you?

A. I had no knowledge that they had.

Q. Did you ever suspect that they had?

A. I wondered sometimes but what they might.

Q. Did you ever make any charges such as you made against these defendants that the West End Chemical Corporation had used its influence with the Government against you?

A. Well, West End Chemical Company and ourselves had a quarrel one time.

Q. I am not asking you that, Mr. Burnham.

Mr. Carr: That is in answer to the question.

The Court: The answer is not responsive. Read the question.

(Question read.)

A. Did I make any charge? No, I don't think I have ever charged them with influencing the Government against me.

(Testimony of George B. Burnham.)

Q. (By Mr. Harrison): But you did charge these defendants in so influencing the Government in your amended complaint, did you not?

The Court: Doesn't that speak for itself?

Mr. Harrison: It appears from the complaint, if the Court please.

Q. In the last sentence in this paragraph you say,——

“We have reason to believe that there are influences apparently at work against the development of these Government borax and potash deposits at Searles Lake.”

What influences did you have in mind when you made that statement away back in 1923?

A. I don't remember.

Q. The West End Chemical Company was not interested in preventing the development of borax and potash deposits at Searles Lake, was it?

A. They didn't like any more competitors to come into the field.

Q. But they were not interested in preventing the development of borax and potash from Searles Lake; they were themselves in [156] that business of developing borax and potash at Searles Lake, were they not?

Mr. Carr: We object to that as argumentative, in the first place, as to what they were interested in. It is argumentative and immaterial.

The Court: I will overrule the objection.

(Testimony of George B. Burnham.)

The Witness: They were competitors, too, and naturally there was considerable competition.

Q. (By Mr. Harrison): I am asking you this, Mr. Burnham: Isn't it a fact that the West End Chemical Company were themselves producing potash and borax from Searles Lake?

A. They were producing borax, not potash.

Q. Borax from Searles Lake?

A. Yes.

Q. And the Pacific Coast Borax Company was not producing borax from Searles Lake, was it?

A. They had property at Searles Lake.

Q. I am asking you——

A. No, they hadn't yet.

Q. They never did?

A. They made some borax, yes.

Q. They were not at that time producing?

A. Not at that particular time.

Q. They were producing only from their mines, were they not? A. Yes.

A. And the West End Chemical Company, on the other hand, was a [157] company that was developing borax at Searles Lake, isn't that true?

A. Yes.

Q. Now, as a matter of fact, I will ask you to turn to your deposition, Mr. Burnham, at page 134 of that deposition:

“Q. I call your attention to the last paragraph of the first page of that letter——”

Mr. Carr: The letter to Varley.

(Testimony of George B. Burnham.)

Mr. Harrison: Yes, which had been marked by another number in the deposition, and then there is quoted, "Our potash and borax competitors——"

"I will interrupt there, and ask you if those were the American Potash & Chemical Corporation, the Pacific Coast Borax Company, and their associated companies—is that correct?

A. I presume I had them in mind at the time.

Q. You had no other competitors at that time, did you?

A. Well, yes, there were other competitors. There was the West End Chemical Company.

Q. In 1923?

A. Yes: I think they were producing in 1923.

Mr. Carr: Who was that?

A. The West End Chemical Company.

Q. (By Mr. Lasky): But the ones you were referring to here were the ones I mentioned—the American Potash & [158] Chemical Company and the Pacific Coast Borax Company, and their associated companies?

A. Yes."

Did you so testify on your deposition?

A. That is what I testified. I am not sure that I knew what the original question was.

Mr. Harrison: I ask, if the Court please, that the witness be directed to respond to the question.

The Court: He already answered that he did.

(Testimony of George B. Burnham.)

Mr. Carr: If there is any explanation to make, may he make it, your Honor?

Mr. Harrison: I suggest that that may be made on redirect examination.

The Court: Does the witness wish to correct his answer?

Mr. Carr: No, but the witness always has a right to explain his answer.

The Court: I do not see that a question that asks whether a man testified to anything requires an explanation. Either he did or he did not. The witness has answered.

Q. (By Mr. Harrison): Will you produce your diary for August, 1925? August, 1925 was two months after the Post Office Fraud Order, was it not, Mr. Burnham? A. Yes.

Q. Do you have an entry there for August 23, 1925, referring to the Borax Trust, or referring to any editorials in scientific magazines? [159]

A. This is August 23rd, you say?

Q. 1925, Yes. A. Yes, I have one here.

Q. Will you read that, please, to the jury?

A. There are two. Which one?

Q. May I seem them?

A. Is that the one you have in mind?

Q. I would like that, and I would like whatever else there is on it.

A. This is a quotation: ~

“In the interest of public welfare he should be exposed and his promotion suppressed. It

(Testimony of George B. Burnham.)

matters not whether he is merely incompetent and deluded or whether he has operated with fraudulent intent. The consequences to industry and the profession are alike disastrous.”

The next one?

Q. Is that the finish of the quotation?

A. That is the finish of the quotation, yes.

Q. To whom did you consider that that referred when you copied the quotation?

A. I considered it referred to me, but I am not sure that I had definite proof that it referred to me.

Q. What other entry have you?

A. “Chem. & Met., November 24, 1944.” [160]

Mr. Carr: What was the date, Mr. Burnham?

The Witness: November 24, 1924.

Q. (By Mr. Harrison): All right. Will you read?

A. Page 805.

“It is our duty to discourage questionable methods of promotion.”

Q. Both of those were quotations from a chemical journal?

A. The second one definitely is. Probably the first one was also.

Q. Have you an entry there with respect to the Borax Trust in connection with that advertisement or that statement? A. No.

Q. Haven't you an entry on August 23rd to the effect that Borax Trust has been advertising with

(Testimony of George B. Burnham.)

them? I may have the date wrong, but you produced that on the deposition.

A. This might be the one you refer to. It was written with hard pencil. It is hard to see.

Q. Yes, that is it. Under what date does that appear?

A. That is a few pages after August 23, 1925.

Q. And the entry was made then in the latter part of 1925 surely, was it not?

A. Probably the latter part of August, 1925.

Q. 1925? A. Yes.

Q. Will you read to the jury just what appears there? [161]

A. "See Hawley in L. A. Real—R-e-a-l—I am spelling a word—Chem. & Met. cost more to print and publish sub price would pay for and final sn," is the next two letters, "based on adv. Borax Tr been," is the next word, "Adv."

Q. If you will pause just a moment, the entry is, "Borax Tr been adv with them." What was the Tr an abbreviation for?

A. I presume that was an abbreviation for "Trust."

Q. And what was the abbreviation of "adv" for?

A. Advertising.

Q. So you intended to make the entry, "The Borax Trust has been advertising with them," is that correct?

A. That is apparently what this sentence is supposed to mean.

(Testimony of George B. Burnham.)

Q. What did you mean by "them"? The chemical journals to which you referred?

A. These are not my ideas.

Q. But you wrote them, didn't you?

A. Yes, but it was dictated.

Q. Who dictated it? A. An attorney.

Q. What attorney? A. Mr. Cruzan.

Q. He was your attorney at that time?

A. He was one of our attorneys.

Q. Did he inform you that the Borax Trust had been advertising [162] in this chemical journal?

A. He had in mind writing a letter to somebody, and he said, "Now, let's write this letter this way. You put it down." He dictated it and I began to write down his thoughts.

Q. Did he tell you as a fact that the Borax Trust had been writing those chemical journals?

A. He was writing that, I said.

Q. Did you believe what you wrote down there, that the Borax Trust had been advertising with these people?

A. I didn't know whether they had or had not.

Q. You had no idea?

A. I presume Mr. Cruzan had. He was writing the letter, not I.

Q. Did you believe Mr. Cruzan's statement that the Borax Trust had been advertising with these chemical journals at that time?

Mr. Carr: I object to that, your Honor. That is going afield. It is incompetent, irrelevant, and immaterial when he believed these people.

The Court: I will overrule the objection.

(Testimony of George B. Burnham.)

Q. (By Mr. Harrison): Will you answer the question? A. Will you ask it again?

(Question read.)

A. Well, I assume that Mr. Cruzan knew.

Q. And therefore you believed him?

Mr. Carr: That is argumentative, and we object to that, if your Honor please. It makes no difference whether he believed [163] it or not. That has nothing to do with the establishment of any knowledge of a trust. That has nothing to do with it at all.

The Court: I will overrule the objection.

The Court: Read the question.

(Question read.)

Q. (By Mr. Harrison): That is, you believed Mr. Cruzan?

Mr. Carr: We renew our objection to that question.

A. I might have seen some advertisements, myself, in the papers. I don't recall, though.

Q. (By Mr. Harrison): Mr. Burnham, I do not like to repeat a question, but I have asked you two or three times did you believe the statement you wrote in your diary at that time that the Borax Trust was advertising with these chemical journals?

A. I presume I did, yes.

Q. What did you mean by the Borax Trust when you wrote it down in your memorandum?

A. Well, it was Mr. Cruzan who used the words. I didn't use them.

(Testimony of George B. Burnham.)

Q. How did you understand those words when you wrote them in your diary, Mr. Burnham?

Mr. Carr: We renew our objection, if your Honor please. Wait a minute, Mr. Burnham, until I can make my objection.

The Court: The objection is overruled. [164]

A. Well, that was the colloquial expression of the two English-owned companies. That colloquial expression applied to the two English-owned companies who dominated the borax industry.

Q. (By Mr. Harrison): And they were the two defendants in this case, were they not?

A. Yes.

Q. And when you used the term "Borax Trust" you meant the American Potash & Chemical Corporation and the Pacific Coast Borax Company, did you not?

A. That was what Mr. Cruzan meant.

Q. And that is what you meant when you used the term, too, did you not? A. Yes.

Mr. Carr: He did not use the term.

Mr. Harrison: He did on many occasions.

The Court: Let us not argue about it.

Q. (By Mr. Harrison): What is the next entry?

The Court: I think we had better take the noon recess at this time. Ladies and gentlemen of the jury, we will recess until two o'clock. Please bear in mind the admonition the court has heretofore given you.

(A recess was taken until two o'clock p.m.)

Afternoon Session, March 28, 1947

2:00 o'Clock P.M.

Mr. Carr: Mr. Burnham, will you take the stand, please?

GEORGE B. BURNHAM

recalled.

Cross-Examination

(Resumed)

Mr. Harrison: Shall I proceed, your Honor?

The Court: Yes.

Q. (By Mr. Harrison): This morning, Mr. Burnham, when the Court adjourned, we were reading an entry from your diary which began: "Borax Trust been advertising with them."

Will you find that, please, and read the rest of the entry?

A. Yes, the rest of the entry from where I left off reading states as follows:

"Trona Company therefore very s-h-r-e-w."

Q. By writing "Trona Company therefore very s-h-r-e-w," you meant to indicate "Trona Company therefore very shrewd," did you not?

A. Well, I was writing pretty fast. Mr. Cruzan was dictating and I probably never finished writing the word or never finished the sentence.

Q. But immediately following the item, "Borax Trust been advertising with them," what you intended to write was "Trona [166] Company therefore very shrewd"?

A. I don't know.

(Testimony of George B. Burnham.)

Q. What is your best judgment as to what you meant by the word "s-h-r-e-w"?

A. The sentence might be considerably longer—I don't know. That word evidently was not finished.

Q. What is the next line?

A. The next line is, "Ask him to write to find out who was member of staff".

Then down below it says, "P.C.B. and Smith".

Q. Do you know what was intended to be meant there by the memorandum, "Ask him to find out who was member of staff"?

A. It reads, "Ask him to find out who was member of staff," yes.

Q. Were you making a memorandum of some suggestion that a letter be written to find out who was a member of this staff of the newspaper in which the editorial appeared?

A. I don't remember the details except Mr. Cruzan was turning over in his mind a letter to write to someone and I was taking it from his dictation and the whole plan of the letter was never finished, or never carried out.

Q. You have no idea as to what was meant by that last sentence?

A. No precise idea.

Q. Have you any general idea?

A. I could guess. [167]

Mr. Carr: Well, don't guess.

Q. (By Mr. Harrison): Unless you have some recollection, I don't want you to guess.

A. No, I have no recollection.

(Testimony of George B. Burnham.)

Q. You have no recollection at all?

A. No.

Q. Will you turn to your copy of the affidavit filed in this case on February 21, 1946, the printed copy of your affidavit? A. Yes.

Q. On the second page in the amended complaint—do you have the affidavit there?

A. You mean in the present suit?

Q. Yes, the present suit.

A. Yes, I have it here.

Q. All right, if you will turn to the second page, please, you will notice under the next amended complaint in the Post Office fraud order a paragraph which begins on the second page about the middle of the second printed page? A. Yes.

Q. And that refers to the amended complaint filed on April 6, 1926? A. Yes.

Q. In the suit against the Postmaster?

A. Yes.

Q. That being the amended complaint that has been introduced [168] in evidence in this case, is that correct? A. That's right.

Q. And it refers to the claim that certain defamatory propaganda by the Borax Trust influenced Dr. Stewart. Now, I am calling your particular attention to this statement in your affidavit, toward the end of the paragraph:

“Said plaintiff subsequently gained information tending to prove said allegation to be correct.”

(Testimony of George B. Burnham.)

Will you state what information you referred to as the information which you subsequently gained which tended to prove the allegation to be correct?

A. Well, the letter that Stephen Mather wrote to Mr. Whitney would be one.

Q. Well, that was some of the information to which you referred here?

A. Yes, some of the information.

Q. And that was the letter from Stephen Mather to C. W. Whitney? A. Yes.

Q. Who is Mr. Whitney?

A. Mr. Whitney was the director and officer of the Burnham Chemical Company.

Q. The plaintiff company? A. Yes.

Q. Will you produce, please, that letter?

A. I gave the photostatic copy to you at the deposition. [169]

Q. Was that produced in the deposition? Have you now the copy you kept in the safe deposit box through the years?

A. Not with me. I am pretty sure I gave it to you in the deposition, or to Mr. Lasky.

Q. I show you now this paper which was offered in evidence in connection with the deposition and ask you whether it is the Mather letter to which you referred? A. Yes, it is.

Mr. Harrison: We offer it in evidence, if the Court please.

Mr. Carr: What is it?

Mr. Harrison: This is the letter from Stephen

(Testimony of George B. Burnham.)

T. Mather to Clarence W. Whitney, dated October 8, 1926.

(The letter in question was thereupon received in evidence and marked Defendants' G.)

Mr. Harrison: This, ladies and gentlemen of the jury, is a letter on the letterhead of the United States Department of the Interior, National Park Service, Grand Canyon National Park, Grand Canyon, Arizona, Office of the Superintendent at Grand Canyon National Park, dated October 8, 1926, addressed to Mr. Clarence W. Whitney at 433 California Street, San Francisco, California:

“Dear Clarence:

“I have your note of July 27, and tried to arrange to connect up with you, but was so busy I could [170] not accomplish it.

I do not see very well how I could possibly interest myself in the Burnham Chemical Company, particularly as I was responsible in a measure for having the fraud order issued against Burnham himself in connection with his indiscriminate efforts to sell his stock to men, women and children all over the world. If you are familiar with all his methods in Reno; how the bankers there compelled him to turn over to them a mass of circulars in which he had used their names without their consent, I do not believe you would be so enthusiastic about the proposition. The process

(Testimony of George B. Burnham.)

may be all right and if he had stuck to this, no one could have raised a question, but the bulk of his time seems to have been spent in raising money from the type of people who could little afford to take the kind of a chance he had to offer. I know of one case, of a woman stenographer with a small income in Chicago, who received his alleged newspaper both at her home and office. He certainly had a remarkable list to draw on, as I have found his circulars all the way from Montana to London.

Borax is now selling at about $3\frac{3}{4}c$ a pound delivered in the East, and if you can show me how millions can be obtained on this price for a product the total sales of which are not much over seventy-five to one hundred thousand tons the country over, you are a better mathematician than I am. [171]

Very sincerely yours,
Stephen T. Mather''

Q. Now, you learned about that letter shortly after its receipt in October, 1926, did you not, Mr. Burnham? A. Yes.

Q. Mr. Whitney gave you a copy of it, or you took a copy of it?

A. Mr. Whitney showed me the letter.

Q. Mr. Whitney showed you the original letter?

A. Yes.

Q. Did you have a photostat made of the letter?

A. Later on I did.

(Testimony of George B. Burnham.)

Q. How much later on?

A. Oh, several years later.

Q. You had it photostated and you had the photostat put in a safe deposit box, did you not?

A. Yes.

Q. And you kept it in the safe deposit box for a period of years, did you not?

A. The company did.

Q. In the company safe deposit box?

A. Yes.

Q. You considered that a letter of some considerable importance, did you not? [172]

A. Yes.

Q. Now, Mr. Mather at this time occupied what position?

A. He was president of the Stirling Borax Company and also head of the National Park Service of the Department of the Interior.

Q. Is he the person who is referred to in the clause of the complaint in this action where you allege that "said fraud order was brought about largely through protest and demand of a highly-placed Federal Government representative who formerly had been, prior to his appointment to such position the Chicago manager and representative of defendant Pacific Borax Company, that at the time of making said protest said official was the president of the defendant Stirling Borax Company. Plaintiff is informed and believes and therefore alleges that said activities on the part of said Government official were done on behalf of said

(Testimony of George B. Burnham.)

defendants herein and in furtherance of said combination and conspiracy and for the purpose of hindering and the preventing, if possible, the carrying out of plaintiff's operations under said lease."

Is he the person referred to in that allegation of the complaint?

A. The complaint in this action?

Q. Yes. A. Yes, he is.

Q. Now, then, let me call your attention also to your letter [173] to the Secretary of the Department of the Interior on November 18, 1939. Have you a copy of that handy?

A. I have a copy, but it is not a complete copy.

Q. In what respect?

A. Because the letter of Mr. Mather has gotten loose from this letter. It was attached to this, but has come off.

Q. But aside from the copy of the letter of Mr. Mather, the copy you hold in your hand is a correct copy of the letter you wrote to the Secretary of the Interior? A. Yes.

Q. Have you the original office copy of that? I think it was returned to you in the deposition.

A. Yes, this is the original office copy, but there is another one, I believe, in better shape than that.

Q. Well, this is clear enough.

Mr. Harrison: We offer that in evidence, if the Court please. Mr. Carr, are you familiar with this?

Mr. Carr: Yes, but I ask you to read it to the jury.

(Testimony of George B. Burnham.)

Mr. Harrison: Yes, I will. We offer this as Defendants' Exhibit next in order.

(The letter in question was thereupon received in evidence and marked Defendants' Exhibit H.)

The Witness: That is not complete, because it doesn't have Mr. Mather's letter attached to it.

Q. (By Mr. Harrison): But it is complete except for the copy [174] of Mr. Mather's letter?

A. And a notation that was written underneath Mr. Mather's letter which explained some things in Mr. Mather's letter which were not true and that all went to the Secretary of the Interior.

Q. In any case, as far as the body of the letter is concerned, it is a true copy of what you wrote to the Secretary of the Interior at that time?

A. Yes.

Mr. Harrison: Do you wish me to read this whole letter?

Mr. Carr: Yes, I wish you would read this whole letter, if you please.

Mr. Harrison: (Reading):

“Washington, D. C.
November 18, 1939.

“Secretary of the Interior,
Washington, D. C.
Sir:

I understand that the American Potash & Chemical Corporation of Trona, California, has

(Testimony of George B. Burnham.)

applied for leases on potash lands in the Searles Lake Potash Reserve in addition to 3319 acres of patented land which they already own. Its application for leases was made as a result of bids which the Commissioner of the General Lands Office advertised for releasing of the Searles Lake Potash [175] Reserve under date of August 22, 1939. It is my understanding that two companies have placed bids, namely, the West End Chemical Company and the American Potash & Chemical Company, which are the two companies now operating at Searles Lake and practically the remaining portion of lands available at Searles Lake will probably be given to these two bidders."

I am suggesting, if the Court please, since this is a long letter, although I am perfectly willing to read it all, I wish only to address the attention of the witness to certain small portions of this.

The Court: Read whatever parts you want; if counsel on the other side wants to read in any or all parts of it, he may do so later.

Mr. Harrison: Very well.

Q. Now, I want to call your attention particularly to this passage in this letter, Mr. Burnham, which reads as follows:

"We believe that it was the influence of foreign-owned interests in the halls of government which was behind all of the difficulties of the Burnham Chemical Co. in the development of

(Testimony of George B. Burnham.)

this potash lease at Searles Lake. The reasons we are led to believe this are as follows: Stephen T. Mather was the one-time Chicago manager of the Pacific Coast Borax Company and was assistant to the Secretary of the Interior from 1915 to 1917 and was a [176] Director of the National Park Service of the Department of the Interior from May 16, 1917, up until the time of his death about 1930 (See *Who's Who in America* 1926). While he held this high government position he was also Vice-President of the Stirling Borax Company which is a subsidiary of Pacific Coast Borax Company, a foreign-owned enterprise. Stephen T. Mather admits that he was in a measure responsible for the Post Office fraud order being issued against the Burnham Chemical Company in a letter dated October 8, 1926, written to Clarence Whitney, one of the directors of the Burnham Chemical Company. A copy of his letter is enclosed."

Then, further down on the same page:

"Mr. Mather himself admits the process may be all right and the foreign-owned Borax Trust itself endorses the process. And so they were afraid we would be a formidable competitor and Mr. Mather informed the Post Office to issue a fraud order so we could not raise funds. Mr. Mather was a high Government official and also an officer and stockholder in the British-owned Borax Trust."

(Testimony of George B. Burnham.)

I should like to ask you, Mr. Burnham——

Mr. Carr: Now, may I read the balance of the letter?

Mr. Harrison: It interrupts the examination.

The Court: You can read it at a later time, but Counsel has a right to pursue his examination the way he wants to. [177]

Mr. Carr: But if they offer the letter we have a right to read the whole letter and not have just a part of it read, as was done by them. At this time I would like to read the whole letter.

Mr. Harrison: It was your Honor's ruling that I could read whatever part I wanted and Counsel could read whatever part he wanted.

The Court: You can read whatever you want, but I am not going to restrict Mr. Harrison or you, Mr. Carr, from pursuing the interrogation of witnesses in whatever way you want to do it. If Counsel only wants to read part of the letter in connection with this examination, he may do so. If you wish to read other parts or all of the letter at a later time, you may do so, but not at this time and interrupt the examination of Mr. Harrison. That would be a waste of time.

Mr. Carr: It is not a waste of time.

The Court: I don't want to argue with you, but you can read the whole or any part of it at a later time.

Mr. Carr: Very well, your Honor.

Q. (By Mr. Harrison): Mr. Burnham, you refer to an admission by Mr. Mather that he was

(Testimony of George B. Burnham.)

an inspector for the Post Office. In making that reference, you referred to this letter of October 8, 1926, which has been introduced in evidence here?

A. Yes.

Q. In referring to Mr. Mather's admission that the process may [178] be all right, you were referring to a statement in that letter, were you not?

A. Yes.

Q. You never had any talk with Mr. Mather on that subject?

A. No, but Mr. Whitney, one of our directors, did.

Q. All right, we will come to that, then. This was in 1926 in October that you learned about this letter, was it not? A. Yes, October, 1926.

Q. Following the April in which you filed the amended complaint of Carson City?

A. That's correct.

Q. Now, then, in 1927, did Mr. Whitney report to you that he had called on Mr. Mather?

A. That he had seen Mr. Mather, yes.

Q. And did he report to you that he had talked with him about this letter, or about the subject matter of the letter? A. Yes.

Q. And isn't it a fact that as a result of that talk and a result of Mr. Whitney's report to you neither he was satisfied nor were you?

A. No, Mr. Whitney was satisfied, then.

Q. Were you satisfied?

A. Yes, with what Mr. Whitney said regarding his conversation with Mr. Mather.

(Testimony of George B. Burnham.)

Q. Now I will ask you, Mr. Burnham, if upon your deposition, [179] and this is Page 518, Mr. Carr, on March 15 of this year you were not asked the following questions and gave the following answers:

Q. This begins at page 517, line 25:

“Q. Who was it you talked to in March, 1927?

A. Well, now, that was right shortly after Mather had written his letter of October 8, 1926, or that was just a few months later, and that might have been the time when Mr. Whitney saw Mr. Mather in San Francisco, here, and had a talk with him.

Q. Were you present?

A. No.

Q. Was the conversation reported to you by Whitney?

A. No.

Q. How do you know what happened then?

A. I think he did, come to think about it, give me some account of the fact that he had talked to Mather, and the opinion was that Mather was acting in the interests of the Government.

Q. You say ‘the opinion’—whose opinion?

A. Mr. Whitney’s talk to us was to that effect, as I remember, but I really don’t recall precisely what Whitney said.

Q. But any way it was after that interview

(Testimony of George B. Burnham.)

in San Francisco that Whitney wrote the letter you are going to look for?

A. Yes. Mr. Whitney wasn't satisfied with the conversation with Mr. Mather in March, 1927.

Q. Nor were you? [180]

A. Nor was I; and so we decided to try to see Mr. Mather again. That was it."

Did you so testify?

A. Yes, but there are two long intervals of time between the time when we decided to see Mr. Mather again. Between that interval of time the cut in the price of borax occurred.

Mr. Harrison: I object, if the Court please, on the ground it is not responsive.

The Court: Yes, I will sustain the objection. Strike out the answer.

Q. (By Mr. Harrison): At any rate, there was that call in March, 1927, or that meeting between Whitney and Mather, was there not? A. Yes.

Q. Do you recall the fact that in 1929 Mr. Whitney wrote upon the stationery of the company as an officer of the company a letter to Mr. Mather, asking to see your company attorney, Mr. Townsend?

A. Yes, that was in March, 1929, wasn't it?

Q. I think it was in January. Have you the letter? That is the letter Mr. Whitney wrote to Mr. Mather with respect to Mr. Townsend, and the letter which he wrote to Mr. Townsend. It does

(Testimony of George B. Burnham.)

not seem to be in the exhibit file for the deposition.

A. Oh, yes, that was January 28, 1929.

Q. You have produced a copy of a letter which Mr. Whitney [181] wrote Mr. Mather on January 28, 1929, and it is a fact, is it not, that you were familiar with the letter at the time that it was sent?

A. Shortly afterward.

Q. You knew about it about that time, and that was accompanied by a letter to Mr. Townsend in Chicago? A. Yes.

Q. Did you notice that? A. Yes.

Q. Mr. Townsend was in Chicago at that time, and is this a copy of a letter that went from the company office by Mr. Whitney on January 28, 1929, to Mr. Townsend?

A. Yes, that is a copy.

Mr. Harrison: We offer this letter, from Mr. Whitney to Mr. Townsend, dated January 28, 1929, in evidence, if the Court please, as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence, marked Defendants' Exhibit I, and read by Mr. Harrison as follows:)

Mr. Harrison: This is a letter to Mr. B. D. Townsend, Blackstone Hotel, Chicago, Illinois.

"My dear Mr. Townsend:

Your letter of January 24th awaited me upon my return from Del Monte.

In accordance with your suggestion I enclose herewith [182] a letter of introduction to

(Testimony of George B. Burnham.)

Stephen T. Mather, which I trust you will find satisfactory. You probably could get information as to his physical condition by inquiring at his office—111 West Monroe Street—or at the office of the Sigma Chi Fraternity, 114 East Jackson Boulevard. C. W. Cleveland or Roy C. Hecox at that address could give you information regarding him. It might possibly be best, however, to call up Ralph F. Potter, 209 South LaSalle Street, who is an attorney and a personal friend of mine, who is also a fraternity brother. Instead of sending you the original letter by Mr. Mather and running the risk of its loss in the mail, I am sending you a photostat copy of it.”

Q. Now you noted that clause in the letter, did you not? A. Yes.

Q. You knew that Mr. Whitney was taking particular care of the original of that letter?

A. Yes.

Q. You had, as I understand it, a photostat made and put in the safe deposit box belonging to the company? A. Yes.

Q. That was because you considered the letter of some importance, did you not? A. Yes.

Mr. Carr: Asked and answered.

The Court: Yes. [183]

Q. (By Mr. Harrison): Will you produce your diary for May 9, 1929? A. Yes.

Q. Is there a note on May 9, 1929, with respect to the Stirling Borax Company? A. Yes.

(Testimony of George B. Burnham.)

Q. And how does that entry read?

A. "Called on H. I. Smith May 9th." Was that the date?

Q. Yes. I was not referring to that particular memorandum. I have no objection to it. I can point out what we are interested in: "Have de Witt——"

A. Yes, further down. "Have de Witt see Borax Smith and find out just what Mather's connection is with P.C.B. Company."

Q. Who was Mr. De Witt?

A. He was one of our directors.

Q. One of your directors, and you made the note at that time to remind you to have Mr. de Witt find out that fact? A. Yes.

Q. Mr. Townsend reported he had not been able to see Mr. Mather in January, 1929, did he?

A. That is right.

Q. And this conversation occurred, according to your testimony, with Mr. Zabriskie on May 17, 1929?

A. Yes.

Q. In his office? [184] A. Yes.

Q. And as soon as you went into that office you saw the picture of Stephen T. Mather on the wall, did you not?

A. Yes, and I asked him some questions about Mather.

Q. Did that make quite an impression on you when you saw the picture on the wall?

A. I was impressed by that picture, yes.

(Testimony of George B. Burnham.)

Q. Why did it make an impression on you?

A. Because Mr. Mather had written us a letter, that letter of October 8, 1928. I realized also that Mr. Mather and Mr. Zabriskie were probably friends.

Q. Because the picture was there?

A. Yes.

Q. Was there any other reason why that made an impression on you when you saw that picture of Mr. Mather on Mr. Zabriskie's wall?

A. That was one of the reasons why I asked Mr. Zabriskie if Mr. Mather had any stock in the Pacific Coast Borax Company.

Q. I am asking you now if there was any other reason, Mr. Bernham, why the picture of Mather made an impression on you before you spoke to Zabriskie about it?

A. I don't remember any other except those two.

Q. Isn't it true that it made an impression on you because you suspected that he was largely responsible for the Post Office Fraud Order, and because you suspected that he was doing that to help your competitors and injure your company, [185] rather than because of his Government position?

A. Well, I had no knowledge at all that he was plotting with our competitors. That is why I asked Mr. Zabriskie the questions that I asked him.

Q. I would like to have you consider my ques-

(Testimony of George B. Burnham.)

tion again. Will you read the question, Mr. Reporter?

(The last question was read by the reporter.)

A. That is two questions. I can't answer two questions with one answer.

Q. Can you answer the question whether it made an impression on you because he had written a letter stating that he was responsible in a measure for the Post Office Fraud Order? A. Yes.

Q. Did it also make an impression on you because you were suspicious that he had done that for the purpose of helping your competitors, rather than because of his position as a Government official?

A. I was a little bit suspicious about it, but I had no knowledge.

Q. You were, however, suspicious?

A. Yes, and that is why I called on Zabriskie.

Q. No, what I am talking about is your suspicion with respect to Mather's act, not about your suspicion in any other respect. You did not know anything about Mather's picture before you called on Zabriskie, did you? A. No. [186]

Q. What was your suspicion about Zabriskie when you were talking to Mather? Was it a suspicion that he had induced this fraud order or brought it about for the purpose of helping your competitors and injuring you, and not for the purpose of performing his duties as a Government official?

(Testimony of George B. Burnham.)

A. I wanted to know whether he did it for the Government or whether he did it for the Stirling Borax Company. That was in my mind.

Q. Was it your suspicion that he was doing it in order to injure you and to help your competitors?

A. Not necessarily the competitors, no. I had no knowledge that he was doing things concertedly with my competitors.

Q. I will now ask you, Mr. Burnham, whether or not at this deposition, page 31, Mr. Carr, line 14, you gave the following testimony:

“Q. And when you talked to Mr. Zabriskie you believed that Stephen Mather was responsible for getting that fraud order issued?

A. I was suspicious that he may have had, that he was doing it for the purpose of helping our competitors rather than because of his position as a Government official.”

Q. Did you so testify?

A. Whereabouts is that?

Q. That is from lines 14 to 20 on page 31.

A. Yes, that is what I testified. [187]

Q. Now, in any of your conversations with Mr. Zabriskie on that day, Mr. Burnham, did you say a word to him about the fraud order?

A. No, but I did ask him a pertinent question.

Q. The question is whether you mentioned the Post Office Fraud Order.

The Court: He said no.

The Witness: No.

(Testimony of George B. Burnham.)

Q. (By Mr. Harrison): Did you mention to him the Mather letter in which Mr. Mather assumed responsibility in part at least for the fraud order?

A. Well, I didn't mention the Mather letter, no.

Q. Did you ever see Mr. Zabriskie again after that meeting of May 17, 1929? A. No.

Q. Did you make further efforts to see Mr. Mather? A. Yes.

Q. Isn't it true that later in the same month of May, 1929, on your return trip west, you made an effort to see Mr. Mather, you and Mr. Whitney?

A. Yes.

Q. For what purpose did you call on Mr. Mather or endeavor to see Mr. Mather at that time?

A. Well, after Mr. Whitney's conference with Mr. Mather in 1927 we were pretty well satisfied with Mr. Mather's explanation [188] of his letter, but when a couple of years later the price war occurred and we were forced out of the borax business, my suspicions were aroused again, and I began to question whether Mr. Mather's letter really—explanation of his letter was really satisfactory. So since Mr. Whitney was going to Michigan, and I was on my way back to California, we decided to meet in Chicago and see Mr. Mather in Chicago, because that is where he lived.

Q. For what purpose?

A. To talk with him about his letter again.

Q. And see whether or not he had some ulterior motive? A. Yes.

(Testimony of George B. Burnham.)

Q. And your suspicions had become aroused at that time again, had they not?

A. Yes, because of the price cut in borax.

Q. And that effort to see Mr. Mather occurred on May 31, 1929, did it not? A. Yes.

Q. That was about two weeks after the conversation with Zabriskie and Emlaw, was it not?

A. Yes, but we had already made our plans to meet in Chicago before I saw him.

Mr. Harrison: I move to strike out "made our plans." The question was, Was it two weeks later?

The Court: I will grant your motion. It will go out. [189]

Q. (By Mr. Harrison): Before we leave the matter of this Zabriskie conversation with respect to Mather, I would like to read you certain testimony that you gave on page 32, Mr. Burnham, from lines 1 to 15, and ask you if you gave this testimony recently. A. Page 32?

Q. Yes. A. What line?

Q. Line 1 to 15:

"Q. And you believed at the time you talked to Mr. Zabriskie that Mr. Mather's reason for getting that fraud order issued was to injure the Burnham Chemical Company, in order to benefit its competitors, Pacific Coast Borax Company, and American Potash & Chemical Corporation; do I understand you correctly?

A. I imagine that was what Mr. Mather, the reason why Mr. Mather caused the fraud

(Testimony of George B. Burnham.)

order. I imagine the reason he did it was to help our competitors get rid of us.

Q. Was that what you believed at the time you talked to Zabriskie? I am trying to get your state of mind then. You said you were very much impressed by the fact that his picture was on the wall. Was that why you were much impressed by it?

A. Yes.

Q. Because at that time you had that belief in your mind? [190]

A. That is right."

Did you so testify, Mr. Burnham?

A. Yes.

Q. You kept that letter from Mr. Mather to Mr. Whitney in your safe deposit box for many years, did you not? A. Yes.

Q. Do you recall the fact that when you went East in 1934 you took that letter with you?

A. No, I do not recall that I did.

Q. Will you please look at your dairy entry for June 30, 1934, made under that date? You have a memorandum, have you not, of a conversation you had with your lawyer, Mr. Townsend?

A. Yes.

Q. Will you read that memorandum to the jury?

A. All right.

Mr. Carr: We object to that—I will withdraw the objection.

A. "Senator Wagner"—it starts out—"advocates redistribution of wealth. Senator Nye fight-

(Testimony of George B. Burnham.)

ing the administration. July 30, 1934. Discussion with B. D. Townsend, Kramer case. Suit against Pacific Coast Borax Company for the patented land, claiming it is held in trust for us. Replacement theory of P.C.B. knocked out."

Q. (By Mr. Harrison): And then you have some geological matters there, do you not?

A. "Take a set of all documents to Washington, D. C. Look in [191] bank vault for the Mather letter, B. C. Company vault, or G. V. A. Townsend said would use Mather letter."

Q. Would use, or could use?

A. Could use the Mather letter.

Q. That is all I am interested in at the present time. We will come back to that later. Refreshing your recollection by that memorandum, it is a fact that you were discussing with Mr. Townsend on that day, July 30, 1944, your suspicions with respect to these defendants, isn't that true? A. Yes.

Q. On that occasion you were discussing a plan to go East, to Washington, or New York?

A. Yes.

Q. On that occasion Mr. Townsend advised you to take a set of all documents and to look into the bank deposit vault for the Mather letter?

A. That particular sentence about looking in the bank vault was probably my own idea, not Townsend's.

Q. So that you made that memorandum so you would not forget to look in the bank deposit vault for the Mather letter? A. Yes.

(Testimony of George B. Burnham.)

Q. But Mr. Townsend did say that in connection with the suspicions you entertained about these companies you might be able to use and could use the Mather letter? A. Yes.

Q. And both you and he considered it a matter of importance, did you not? [192] A. Yes.

Q. Did you consider it as a matter of importance as being evidence of an intent to injure the plaintiff?

A. Yes, by the Stirling Borax Company, but not necessarily by the others.

Q. Did you think it might be some evidence of a conspiracy?

A. No, I had no knowledge or evidence or thought regarding a conspiracy.

Q. You did not have any thought that that letter might help you to show a conspiracy between American Potash and Pacific Coast Borax?

A. No.

Q. Then I would like you to turn to page 263 of the deposition, and I will ask you if you testified as I shall now read.

A. What page is that?

Q. 263, line 8, or I will begin to read from line 2 on page 263, and ask you if you testified as follows:

“Q. What did he tell you?

A. In other words, I remember asking Townsend, ‘Shall I use the Stephen Mather letter if I have to?’ And he said, ‘Yes, if you feel it is going to help your cause along, go

(Testimony of George B. Burnham.)

ahead and use the Stephen Mather letter,' and that was the first time he had ever decided to do that.

Q. Did he tell you in what way the Stephen Mather letter [193] could be of use to you? You must have discussed it there, did you not?

A. Yes, our suspicions had been aroused again that the competitors, that the Pacific Coast Borax Company at least, might be violating some antitrust laws, and if I needed Stephen Mather's letter as substantial evidence to prove any such violation or to give any of the Government officials as additional information to help them to decide whether there was any law being violated, why, to go ahead then and use it.

Q. In other words, both you and he felt at that time that the Stephen Mather letter was some evidence that the Pacific Coast Borax Company was out to injure your company and had been responsible for the Post Office Fraud Order, and was responsible for other acts injuring the Burnham Chemical Company?

A. We had no knowledge of that, but we began to think that maybe there was some connecting link.

Q. My question was in regard to your knowledge. You and Townsend both thought that the Stephen Mather letter was some evidence to support a charge?

Mr. Carr: Might be.

(Testimony of George B. Burnham.)

A. Might be some evidence.

Mr. Lasky: (Continuing) — to support that charge of conspiracy between the Pacific Coast Borax Company [194] and the American Potash & Chemical Company to injure your company?

A. That is right, that it might be some evidence.

Q. Mather was dead at that time, wasn't he?

A. Yes.

Q. You first decided to use Mather's letter after he was dead?

A. Well, in fairness to Stephen Mather we had made many attempts to see him while he was living to discuss that letter with him, but we were always unsuccessful in those attempts."

Did you so testify?

A. Yes, but that is not the right inference. You ask an awful long question there.

The Court: No, the trouble is with this type of examination the witness wants to make explanations, and it takes too long when we get into that. The only question before you is whether or not you gave some testimony.

The Witness: Yes, I gave that testimony.

The Court: Your attorney can bring out other matters if he wishes to on his examination.

The Witness: Yes, your Honor.

Q. (By Mr. Harrison): Now, then, in Septem-

(Testimony of George B. Burnham.)

ber, 1939, you started East again, did you not, on another trip? A. Yes.

Q. That was in connection with a hearing about the Little Placer [195] property, was it not?

A. That is right.

Q. When you went East on that trip you took the Mather letter with you because you considered it important, did you not?

A. Yes, but that, again, infers that I took the Mather letter in 1934.

Q. Well, let me ask you, you and Mr. Townsend had discussed the matter of making it?

A. Yes.

Q. Do you know whether you did in fact take it?

A. I don't remember if I did. I don't think I did.

Q. But you made a memorandum in your book to get it out of the safe deposit box? A. Yes.

Q. You do not remember whether you did, or not?

A. I am pretty sure I did not. I can't quite——

Q. You do not remember one way or the other, but you do remember that you took it back because you considered it a matter of importance in September, 1939? A. That is right.

Q. With respect to the matter of the price cuts that have been referred to, the fact is the price cuts occurred in the month of June, 1928, in the price of borax, did they not? A. Yes.

Q. How much did those price cuts amount to?

A. Well, it amounts to a cut in the price of

(Testimony of George B. Burnham.)

borax of one-half when figured at the plant, f.o.b.

Q. One-half the previous price? A. Yes.

Q. It dropped suddenly in June? A. Yes.

Q. And continued to drop through the year?

A. Yes.

Q. And it reached an all-time low, did it not?

A. Yes.

Q. And what was that?

A. About \$13 a ton in bulk f.o.b. Searles Lake.

Q. Now, then, what had been the price in prior years? Had it ever gone much below \$50 a ton?

A. Never had that I know of.

Q. So here was a break such as never had occurred before, is that true?

A. Not all at once, but half of it occurred in one month's time.

Q. A break to that extent had never occurred before, had it? A. Not to my knowledge.

Q. Not for many years, is that true?

A. That is correct.

Q. And it occurred in the very month when you were beginning production at the Burnham plant, did it not? A. Yes. [197]

Q. And it was simultaneously by the American Potash & Chemical Company and the Pacific Coast Borax Company?

A. I am not so sure simultaneously, but during the month the two of them came down.

Q. Wasn't it substantially simultaneously?

A. Within the month, yes.

(Testimony of George B. Burnham.)

Q. You do not mean to say one of them cut the price in half and the other one did not?

A. Well, the prices tumbled between the two.

Q. We will say the prices of both tumbled in June.

A. Yes.

Q. There is no doubt about that, is there?

A. That is right.

Q. And you were following the situation very closely?

A. Yes.

Q. And you knew about it at the time?

A. Yes.

Q. And the effect of the price cut, the fall in prices in 1928 was that you were unable to carry on profitable production at your borax plant, is that true?

A. Yes.

Q. You knew at the time that the fall in prices made production at a profit by you impossible, did you not?

A. Yes.

Q. And you knew your competitors, to wit, the defendants in this case, were being benefited by that circumstance, did you not? [198]

A. I thought they were suffering as bad as we were.

Q. Didn't you consider at that time that they were being benefited by reason of the elimination of your company?

A. In that regard they would benefit.

Q. And you knew that at the time, did you not?

A. Yes.

Q. With respect to that price cut being simultaneous, I will ask you to turn to Page 28 of your

(Testimony of George B. Burnham.)

deposition, if you will, at Line 15. The question is this——

A. Page what?

Q. Page 28, Line 15. The question is, Did you testify as follows in your recent deposition:

“Q. The both of the companies, the Pacific Coast Borax Company and the American Potash & Chemical Company cut their prices at the same time in June, 1928?

A. Yes, the quoted prices in the Chemical Journal show that the cut occurred in June, 1928, and presumably with both companies at the same time.

Q. And you were aware of that fact, were you, at the time it occurred in June, 1928?

A. Oh, yes.

Q. Did you make it a point to follow the market prices of borax?

A. Yes.”

Did you so testify? [199]

A. Yes, but the published prices only came out once a month.

Q. Weren't you observing at that time when you were closing production what was actually happening on the market? You were in charge of the company, were you not?

A. Yes, the prices in the published magazine came out once a month, but we know they were falling continuously during the month of June.

Q. You knew they were falling continuously

(Testimony of George B. Burnham.)

during the month of June on the part of both companies?

A. Yes, we knew that, on the part of both companies, because of our attempts to make sales.

Q. You found that out on your attempts to make sales?

A. Yes, but "simultaneously" is in that month is what I meant.

Q. You did not notice one company dropping far down below the other, did you, at any particular time? A. No.

Q. You at once consulted Mr. Townsend about the cut in price and the effect on your business, did you not? A. Yes.

Q. And Mr. Townsend wrote a letter to a lawyer friend of his in Washington by the name of Hinrichs? A. Yes.

Q. And gave you a copy of that letter?

A. Yes.

Q. Have you that letter, Mr. Burnham? [200]

A. Yes, this is a copy of it.

Q. Mr. Townsend gave you a copy about the time he wrote it? A. Yes.

Q. And you kept the copy ever since, or a copy ever since?

A. Yes, I think your documents have a copy, too.

Q. Yes, it is here, Mr. Burnham. This is a copy which you have kept ever since 1928, of this letter from Townsend to Hinrichs, is it? A. Yes.

Q. At about this time you were discussing with

(Testimony of George B. Burnham.)

Mr. Townsend the question of your remedy as a result of what happened, were you not?

A. Yes.

Mr. Carr: What was the date of that?

Mr. Harrison: July 26, 1928.

Mr. Carr: Thank you.

Mr. Harrison: We offer the document in evidence as the defendants' exhibit next in order.

(The letter in question was thereupon received in evidence and marked Defendants' Exhibit J.)

Mr. Harrison: This is a letter dated July 26, 1928, to Mr. H. Stanley Hinrichs, c/o Bright, Thompson & Hinrichs, Southern Bldg., Washington, D. C., which reads as follows: [201]

“July 26, 1928.

“Mr. H. Stanley Hinrichs,
c/o Bright, Thompson & Hinrichs
Southern Bldg.
Washington, D. C.

My Dear Stanley:

It has been some time since I have written to you. I had hoped that I would return to Washington last Spring, but it became impossible. I have made my plans to present that matter early during the next session of Congress.

A condition has arisen in the borax industry, con-

(Testimony of George B. Burnham.)

cerning which I may be asked to render an opinion upon the following question :

If two concerns already in control of the borax market, not only in the United States but in the whole world, engage in a price war, by selling at prices which preclude any profit, and the immediate effect of which will be to kill off the only potential competitors; is the transaction one which may properly be made the subject of action by the Federal Trade Commission, under the 'unfair competition' clause (Section 5) of the Federal Trade Commission Act?

There are other features of the transaction which might strengthen the case. For example, I am inclined to think that the present competition, although very bitter in form, [202] and apparently in earnest, is in fact designed by the controlling heads of these two concerns (and which are located in England) for the express purpose of killing off threatened competition, although their subordinates may not really know that to be the fact. But this would be very difficult to prove, even if true. Therefore, in stating the question, I have purposely limited it to a question whether the transaction would constitute 'unfair competition' if the practical effect of it was to drive out competitors, even though the evidence does not prove that those engaged in the practice contemplated or intended that result.

I had given some consideration to the terms of

(Testimony of George B. Burnham.)

the Federal Trade Commission Act; and I have read the discussion of 'Price Cutting as a Form of Unfair Competition', in Henderson's book, 'The Federal Trade Commission,' written in 1924, including the four cases discussed at pages 246 to 261. I presume there have been subsequent decisions upon the question. I have not had time to examine subsequent decisions. From my limited consideration of the question, I am inclined to the opinion that proof of a persistent maintenance of prices at such a low level as to preclude profit, for a period of approximately two years, with proof that the direct effect thereof is to crush attempted competition, would constitute 'unfair [203] methods of competition in commerce,' within the meaning of the law. Stating it more precisely: I think that proof of those facts would constitute a prima facie case and would throw upon the parties employing those methods the burden of justifying them.

If I should be employed in this matter, I would endeavor to have my clients employ your firm to be associated with me, providing they can and will pay a sufficient compensation.

While I cannot at this time guarantee employment, I am taking the liberty of submitting the above question to you. I would appreciate your off-hand impression; of course, I would also appreciate the off-hand impressions of your associates, but I do not want to impose upon the time of any of you, until I can give you some assurance of employment. I feel under such heavy obligations to all of you for

(Testimony of George B. Burnham.)

the many courtesies which you extended to me while I was in Washington, that I would not burden you with the present inquiry, except for the fact that I really hope that it may lead to a joint employment.

I purposely refrained from discussing the question above, so as to avoid extending the length of this letter; but there is one point which I would like to mention, viz.; If these two English concerns are engaged in actual competition, then the present price war is even more clearly a [204] case of 'unfair methods of competition in commerce'; while, on the other hand, if they are not engaged in actual bona fide competition, then the present ostensible price war could have no other purpose than to prevent the establishment of any competitors in the business.

There are a number of personal matters concerning which I want to write to you, but I will not stop to do so today. I am limiting this letter to the single inquiry stated above, because I expect to receive a call from the interested parties in about ten days from now, or possibly a little less. Therefore, I will send this letter by air mail, in the hopes that I may have a reply from you before anything arises here concerning the matter.

Very sincerely yours,

BTD:NL"

Q. Now, you understood, did you not, Mr. Burnham, that the two concerns referred to in this letter,

(Testimony of George B. Burnham.)

one as "two concerns," and one as "two English concerns," were the defendants in this action, American Potash & Chemical Company and Pacific Coast Borax Company? A. Yes.

Mr. Carr: That was a letter signed by Mr. Townsend?

Q. (By Mr. Harrison): That was a letter signed by Mr. Townsend and which he gave you a copy of? A. That's right. [205]

Mr. Harrison: I will stop at this point, your Honor.

The Court: Yes, we will take the afternoon recess at this time. Ladies and gentlemen of the Jury, please bear in mind the admonition that the Court has heretofore given to you.

(Recess.)

Mr. Harrison: Shall I proceed, your Honor?

The Court: Yes.

Q. (By Mr. Harrison): Mr. Burnham, later in the year 1928, and to be more specific, in November, 1928, did you receive an opinion letter from Mr. Townsend on this subject dated November 13?

A. Yes.

Q. Have you that letter?

A. Yes, it is here.

Mr. Carr: What was that date?

Mr. Harrison: November 13, 1928.

Q. Would you hand me that, please?

A. Yes.

Q. This is an original letter received by you within a day or two after its date? A. Yes.

(Testimony of George B. Burnham.)

Mr. Harrison: We offer the letter in evidence, if the Court please, as Defendants' exhibit next in order.

(The letter in question was thereupon received in evidence [206] and marked Defendants' Exhibit K.)

Mr. Harrison: That letter is written, I notice on the letterhead of Francis J. Heney? A. Yes.

Q. You had consulted Mr. Heney and Mr. B. D. Townsend on this matter? A. That's right.

Q. They had offices together, did they? They were associated, were they?

A. They were associated together.

Q. The letter is addressed to you at the Merchants Exchange Building in San Francisco; you had an office there at that time?

A. That's correct.

Q. I will read the letter to the Jury:

“Francis J. Heney, Attorney and Counsellor at Law, Suite 1002 Flatiron Building, San Francisco, Kearny 4860.

November 13, 1928.

“Mr. G. B. Burnham,
Insurance Exchange Bldg.,
San Francisco, California.

My dear Mr. Burnham: [207]

“Herewith I hand you the memorandum concerning the Federal Trade Commission, its

(Testimony of George B. Burnham.)

powers and methods of procedure, which I have prepared pursuant to my employment by you for that purpose. I have made this memorandum quite complete, as to the general features of the subject, and in doing so have gone beyond the limits of the question which you have in mind. I have done this for two purposes: (1) During our preliminary conferences upon the subject, I observed that some of your associates desired general information of this kind; (2) A fairly complete knowledge of the subject will enable anyone to have a more accurate appreciation of the rules concerning any particular subject or question.

Moreover, I have purposely prepared this memorandum in such form that it does not disclose any particular question which you or anyone else may have in mind.

Herewith I also hand you a memorandum concerning the 'Application of Federal Trade Commission Law to Borax Trade Conditions.' In this document, I have merely given my ultimate conclusions together with a few observations for the purpose of impressing upon the minds of yourself and your associates the importance of avoiding any general discussion of this subject, if any action is to be taken concerning it. I mentioned the reasons for this course during our last conference and all of you agreed with me. [208] Upon further consideration, I am even more strongly im-

(Testimony of George B. Burnham.)

pressed with the importance of observing this caution.

The conclusion which I have expressed in the latter memorandum is supported by a very intensive study which I have given the subject during the past two weeks. I am now convinced that proceedings before the Federal Trade Commission would result in substantial benefits to those interested in the subject. But I make this prediction with one condition annexed, and that is, the observance of the caution as I have recommended both in the memorandum and in this letter.

Herewith I also hand you bill for services rendered. I have performed all the services contemplated by this preliminary employment. In fact, I have gone much beyond the work which I contemplated at the time of this employment; but I did this, to enable me to examine every federal decision upon this subject, which would give me confidence in the views which I have expressed.

Very truly yours,

B. D. TOWNSEND

BDT:NL

Inc.3."

Q. Have you a copy of that letter referred to, Mr. Burnham? A. Yes.

Q. Have you the memorandum? [209]

A. Yes.

(Papers handed by witness to Mr. Harrison.)

(Testimony of George B. Burnham.)

Mr. Harrison: Mr. Burnham has handed me two memoranda, one marked Defendants' Exhibit 71 for Identification in the deposition which I now offer in evidence as Defendants' Exhibit next in order.

(The memorandum in question was thereupon received in evidence and marked Defendants' Exhibit L.)

Mr. Carr: Are you going to put two of them in together?

Mr. Harrison: Yes, I will put them in together, Mr. Carr, if you wish. There is a long discussion of the law in one memorandum. This is entitled, "Application of Federal Trade Commission Law to Borax Trade Conditions":

"For about three years, and particularly during the past year, a persistent price-war has been waged in the Borax Trade, until the price has been reduced to a point below actual cost of production, if all of the actual elements of production-cost are included in the computation, and the methods of computation are otherwise correct.

This situation imperils the continued existence of competition in the Borax Trade, and will ultimately lead to the establishment of an absolute trust, if the causes of the situation are not terminated.

Various excuses and explanations are offered by those responsible for this situation, but it is

(Testimony of George B. Burnham.)

quite evident [210] that these excuses and explanations are mere cloaks and disguises, and that an adequate investigation of the subject will develop proof that this situation is the natural and inevitable result, and therefore the very object and purpose, of trade practices which are in violation of the Federal Trade Commission Act, also the Federal Anti-Trust Laws.

These unlawful practices may be concealed by clever theories and ingenious accounting devices, but when the true facts are disclosed, the very cleverness and ingenuity employed to cloak and disguise the true facts, will become added and persuasive proof of consciousness of an illegal purpose.

If this matter is to be brought to the attention of the Federal Trade Commission, there should be little or no discussion of the facts or the methods by which they may be established, until they are presented to the Commission; otherwise there is danger, no matter how cautiously the subject is handled, that the party charged may learn the methods to be employed to expose the true facts, and may then defeat the most thorough and intelligent investigation by the Federal Trade Commission investigators.

This caution is especially applicable to cases where the illegal practices have been cleverly concealed or disguised. [211]

The proper course to pursue is to present

(Testimony of George B. Burnham.)

the matter clearly, and so as to arouse the interest which it deserves; the foregoing to be supplemented by such suggestions and services from time to time as may be desired.

In the event that the investigation results in the filing of charges by the Commission, any interested party, whose interest will be affected by the result of the hearing, will be permitted to intervene."

Q. Now, I call your attention to the fact, Mr. Burnham, that in the defendants' Exhibit K, which is Mr. Townsend's letter, he says that he has included a few observations "for the purpose of impressing upon the minds of yourself and your associates the importance of avoiding any general discussion of the subject."

Then: "I mentioned the reasons for this course during the last conference and all of you agreed with me. Upon the further consideration I am even more strongly impressed with the importance of observing this caution."

Had Mr. Townsend in fact expressed that caution to before he wrote this letter of November 13, from which I have quoted? A. I do not remember.

Q. Have you, Mr. Burnham, a copy of your circular letter to your stockholders of January 12, 1929? A. January 12, 1929?

Q. Yes. It is possible there may be a copy here in the deposition papers. I will show you this document and ask you whether or not that is a letter that

(Testimony of George B. Burnham.)

was sent out under your facsimile signature on January 12, 1929, to all stockholders of the Burnham Chemical Company. A. Yes, it is.

Mr. Harrison: We will offer the letter in evidence, if the Court please, as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendant's Exhibit M.)

Q. (By Mr. Harrison): Have you a copy?

A. Yes, I have a copy. I don't have one with me.

Mr. Harrison: I will read from my copy, Mr. Burnham, to save time. You can follow.

I just want to read two passages in this circular, ladies and gentlemen of the jury, a copy of which I have here, and of which Mr. Burnham has a copy:

"Some very important developments in the borax market have been taking place in recent months which have vital significance, in spite of the fact that the apparent motives back of them are being carefully camouflaged. For the past hundred years, in fact during its entire history, [213] the price of borax has never been below \$75 per ton delivered. It is rather a peculiar coincidence that last summer, just at the time we were getting ready to produce and put our product on the market, the price dropped to \$50 per ton delivered. Taking into consideration the fact that the freight charge is fixed, this means cutting the price of borax at the

(Testimony of George B. Burnham.)

plant almost in half. It means that we cannot make any profit on our borax at this early stage of development. We will be doing well to break even on our operating expense.”

Again later in the letter——

“It has been urged by some who are familiar with the situation that in selling borax at \$50 per ton our competitor is selling below actual cost of production, if correctly computed; and that this remarkable cut in the price of borax is nothing but a price war to destroy competition, and particularly the competition of young competitors who are struggling to become established. This matter has been under consideration for some time, and, for obvious reasons, the subject was kept confidential while it was under investigation. That is the reason why this price war has not been mentioned to you until the present time; and, for the same general reason, further discussion of it will not be indulged in at this [214] time, except to say that if our competitor has been selling borax for less than cost, it is believed that this fact will increase the wrongs imposed upon us, and therefore will increase the legal remedies available to us.”

Q. I call your attention, Mr. Burnham, to the statement there that “it has been urged by some who are familiar with the situation that in selling borax at this price our competitor is selling below actual cost of production.” Who was it who was familiar with the situation who urged that upon you?

(Testimony of George B. Burnham.)

A. I do not recall at this time. It may have been some of our customers.

Q. Some of your customers?

A. It might have been. I don't remember.

Q. They were not complaining of the price, I assume?

A. They didn't want to see us go out of business.

Q. Have you the circular letter of March 25, 1929, to the stockholders? I have it here, Mr. Burnham, from the deposition. This paper that I show you now is a circular letter, is it not, which was sent out on its date, March 25, 1929, under the facsimile signature of yourself as president, Mr. de Witt as vice president, and Mr. Whitney as secretary-treasurer?

A. Yes.

Q. And was sent to all the stockholders of the company about its date?

A. That is right. [215]

Mr. Harrison: We offer the document in evidence, if the Court please.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit N.)

Mr. Harrison: You can follow me while I read from a couple of these pages to see that I get it right. I desire to read to the jury two paragraphs from this letter of March 25, 1929:

"Dear Stockholder:

"But just as we went into production came the slash in the price of borax. The price

(Testimony of George B. Burnham.)

dropped to the lowest level in the history of borax production. A drop of more than 50 per cent in the price of borax at the plant. The market became demoralized, and today there is almost no such thing as a definite borax price. There are as many prices as there are purchasers. We believe no one is really making a profit, and for this reason we expect conditions soon to change to normal, but the fight is still on. Your company, an infant in the industry, without definitely established markets, without surplus or reserve, was hit the hardest. The solid ground was taken out from under our feet. Our funds were soon exhausted and tied up in finished product."

Upon the next page:

"Let us take stock of our resources. What have we? [216] On close checking we believe that we have quite a lot. True enough, not much to put on the market for a quick sale, under the conditions, but a big thing if properly developed. Of course, the raw material is there—no one doubts that. Our processes are sound and economical—that has been proven to the dissatisfaction and disappointment of our adversaries. Our borax plant is complete and in splendid condition. Our organization is capable, progressive, loyal and energetic. Our processes, which we believe to be the most valuable at Scarles Lake, are legally protected by

(Testimony of George B. Burnham.)

United States Letters of Patents. Our development work for the recovery of salts other than borax is progressing rapidly and satisfactorily. What is wrong, then? Nothing fundamentally, except that some sinister forces apparently are trying to rob us of what is rightfully ours. They know our weak point (lack of surplus and reserve) and they are trying to take advantage of it."

Q. In writing and signing that letter, whom were you intending to designate by the words "some sinister forces?"

A. I don't know. That is why I said I did not specify.

Q. Did you have anybody in mind when you wrote that letter? A. I don't know.

Q. You have no idea now?

A. That is why I couldn't name them at that time.

Q. What is that? [217]

A. I was not able to name them at that time.

Q. They certainly included the defendants in this case, the American Potash & Chemical Corporation and Pacific Coast Borax Company, did they not?

A. We knew they were infringing our patents, that is, we believed they were infringing our patents, using our process to defeat us.

Q. Didn't you intend to designate them, didn't you have them in mind when you spoke of sinister forces in that letter?

(Testimony of George B. Burnham.)

A. We had one of them in mind, and that was the American Potash & Chemical Corporation, because we felt pretty certain that they were infringing our processes and using our processes to defeat us, our patented processes.

Q. I will ask you whether in your deposition on page 291, line 5, you gave this testimony:

“Q. Now, Mr. Burnham, who were the sinister forces that you there referred to who were trying to rob you of what was rightfully yours?

A. There might have been sinister forces that I had in mind.

Q. But you had in mind among them the Pacific Coast Borax Company and the American Potash & Chemical Corporation?

A. I was wondering if they might not be one of the companies.

Q. When you use the term ‘sinister forces’ in this letter, [218] those two companies were either the sinister forces or among them?

A. They were among them. We had others in mind, such as the Blue Sky Commissioners.”

Q. Did you so testify? A. Yes.

Q. Now, I would like to call your attention to the month of December, 1928, and particularly a conversation that you had with Mr. Emlaw on December 6, 1928. Will you turn to your diary for that date? A. Yes, I have it.

Q. Do you have that entry?

(Testimony of George B. Burnham.)

A. I have one entry here dated December 6, 1928.

Q. Refreshing your recollection by that entry, is it a fact that on that day you called upon Mr. Emlaw? A. Yes.

Q. In New York? A. That is right.

Q. And on that occasion you accused him, did you not, or accused his company, the American Potash & Chemical Corporation, of infringing the patents of the Burnham Chemical Company?

A. That is right.

Q. And he denied the accusation, did he not?

A. Yes.

Q. And he was angry and defiant in denying the accusation, [219] was he not?

A. In words somewhat along that line, yes.

Q. Isn't that a fair description?

A. Yes, that would be.

Q. You had a draft of a telegram describing his denial as being angry and defiant? A. Yes.

Q. Notwithstanding his denial of patent infringement you did not believe that denial, did you?

A. No, I was pretty certain that they were infringing our processes. I did not have absolute proof, but I felt fairly convinced of it.

Q. You felt fairly certain that they were infringing, didn't you, at that time? A. Yes.

Q. Now, then, after having left that conversation, when Mr. Enlaw was angry and defiant, and when you did not believe him, did you go over to

(Testimony of George B. Burnham.)

see Mr. Zabriskie on the same day on this patent matter? A. Yes.

Q. That was on December 6, 1928? A. Yes.

Q. And you had a talk with him about the matter of the infringement of your patent by the American Potash & Chemical Corporation, did you not?

A. Yes.

Q. What did you tell him in effect? [220]

A. Well, I had an hour's or more talk with him, and I told him that I believed the American Potash & Chemical Corporation were infringing our patents, and we discussed the particular patents that I had in mind, and I asked Mr. Zabriskie if he would be willing to finance a suit against the American Potash & Chemical Corporation for the infringing of our patents.

Q. What did he say to that?

A. He said that was very interesting and he would like to give it more thought, and asked me to come back the next day and discuss it with Mr. Tingley, the chief chemist, and go over the patents again with him to see again for sure if the American Potash & Chemical Company were infringing our patents.

Q. Did you tell him how you would be benefited or how the Pacific Coast Borax Company would be benefited if he put up this money to bring the suit against the other company?

A. Yes, I told him I would give them exclusive rights to use our patented processes, and furthermore it would strengthen the price of borax, be-

(Testimony of George B. Burnham.)

cause if the American Potash & Chemical Company were infringing our process, and we prevailed in a suit against them, then they would have to pay us royalties, and, of course, that would increase the price of borax.

Q. And so that would benefit the Pacific Coast Borax by raising the price? [221]

A. Yes, that would be a legal way of protecting ourselves on the drastic cut in price.

Q. Mr. Zabriskie asked you to write him a letter?

A. Well, not that day.

Q. Did he the next day?

A. The next day, yes.

Q. What did he say?

A. We went into the thing more thoroughly the next day and he said to write me a letter conforming what we talked about and to give him a definite understanding of what kind of a proposition we would make to them.

Q. Now, you did write him a letter, then, did you?

A. I returned to San Francisco, conferred with our directors, and wrote Mr. Zabriskie a letter on January 15th, 1929.

Q. You have that, do you, Mr. Burnham? It doesn't seem to be here.

A. Yes, this is the only copy of the letter that I have, and if it is turned into the court, I would like to have copies made.

Q. I have no objection to your having a copy

(Testimony of George B. Burnham.)

made and having it substituted later, if Mr. Carr wishes and you do, too.

A. The same applies to some of the documents Mr. Townsend gave us.

Q. We can arrange that.

We offer this letter in evidence, if the Court please, [222] as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit O.)

Mr. Carr: What is the date?

Mr. Harrison: January 15, 1929, written by Burnham Chemical Company, G. B. Burnham, to the Pacific Coast Borax Company, Attention Mr. C. B. Zebriskie. This is a somewhat long letter, and if Mr. Carr wishes to read it all later, I have no objection, but I wish to call to the jury's and the witness' attention the following passages:

"Pacific Coast Borax Company, 100 William Street, New York City, N. Y.

Dear Sirs:

"Pursuant to our conversation last month concerning our patent situation at Searles Lake, I have discussed the matter with our directors, and submit to you the following statement of our position concerning the matter:

"1. For a long time we received information to the effect that our patent rights, as to borax,

(Testimony of George B. Burnham.)

were being violated by the operations of the American Potash & Chemical Corporation. After a careful investigation and consideration of the matter, we became convinced that the American Potash & Chemical Corporation was, **and for a long time** had been, engaged in flagrant violations of such [223] patent rights; whereupon we served upon them a formal notice of infringement on October 31, 1927."

Mr. Carr: Will you read a little louder?

Mr. Harrison: Yes, surely.

"2. In the meantime, the American Potash & Chemical Corporation has engaged in a persistent and flagrant price war, as to borax, reducing the price to \$50 per ton or less, delivered anywhere in the United States. We are reliably informed that the prices quoted by this company in the present month and for several months last past, are below its actual cost of producing borax, if such production cost be accurately and properly computed, and we are further reliably informed that the specific purpose of this price war is to destroy competition as to borax.

"3. The American Potash & Chemical Corporation could not carry on this price war except for the fact that they are illegally employing the economical advantages of the patent rights of the Burnham Chemical Company. In other words, they are illegally using the pat-

(Testimony of George B. Burnham.)

ent rights of the Burnham Chemical Company for the specific purpose of manufacturing borax at a low cost, and then selling the borax at such a low price as to drive out competitors, including the Burnham Chemical Company, which is the owner of the patent rights illegally employed [224] for that purpose. We are advised by our attorneys that, under these facts, the American Potash & Chemical Corporation is engaged in an 'unfair method of competition,' within the provisions of the Federal Trade Commission Act, and allied acts."

Q. You understand, Mr. Burnham, those allied acts included the Antitrust Laws, did you not?

A. I didn't know. [224-a]

Q. What did you mean by the term "Allied acts?"

A. All Anti-Trust acts I presume are included.

Q. I should like to read one other paragraph on that letter, on the last page:

"I will venture the prediction that the very institution of a suit by us as above proposed will result in an immediate increase of the price of borax of not less than \$10 per ton, and this increase alone will much more than offset the cost to your company of such benefits of the above proposition."

Did you tell Mr. Zabriskie, Mr. Burnham, how much you wanted him to put up for the expense of this suit?

(Testimony of George B. Burnham.)

A. I believe I suggested \$50,000.

Q. What reply did he make to that letter?

A. I couldn't find a reply in my file, but it seems to me he referred the matter to London and I never did hear the result.

Q. Well, didn't he in fact refuse to assist you in the matter of that particular suit?

A. Yes, I couldn't find his reply, but it seems to me we got a letter, but I couldn't find it in the file.

Q. In any event, in one form or another you learned the Pacific Coast Borax Company was not willing to put up this \$50,000 or any part of it?

A. Yes. [225]

Q. And when you learned that, that revived and increased your belief, did it not, that the P.C.B., the Pacific Coast Borax, had acted jointly with the American Potash & Chemical Company for the purpose of injuring the Burnham Chemical Company?

A. No, I don't think it did that.

Q. You don't think it had any effect in that regard. Didn't it give you an added belief and suspicion when Zabriskie wouldn't cooperate with you, that he was cooperating with the American Potash & Chemical Company in the matter of cutting prices?

A. Well, Zabriskie—they had their own patents and they began to think that the American Potash & Chemical Company were infringing on the patent of the Pacific Coast Borax Company and perhaps they would be just as well off to sue the Ameri-

(Testimony of George B. Burnham.)

can Potash & Chemical Corporation for infringing on their own patents.

Q. I don't think, perhaps, you understood my question:

Did the fact that Zabriskie wouldn't help you, give you an added belief or suspicion that his company was cooperating with the American Potash & Chemical Company to cut prices to drive you out of business? A. No, it didn't.

Q. I will ask you to turn to the deposition, at page 105, if you will, please—Page 105, Line 11, and I will ask you if you testified as follows: [226]

Mr. Carr: Page 105, Line 11?

Q. (By Mr. Harrison): Yes, have you that?

A. 105, Line 11?

Q. Yes. I will ask you whether you testified at your deposition that was taken within the last month as follows:

“Q. Then when Mr. Zabriskie refused to advance the money to assist you in bringing a patent suit against the American Potash & Chemical Corporation so that you could get the price up, you attached significance to that, did you?”

Mr. Carr: What page and what line?

Mr. Harrison: Line 11.

Mr. Carr: Oh, pardon me.

Mr. Harrison: I will re-read the question:

“Q. Then, when Mr. Zabriskie refused to advance the money to assist you in bringing a

(Testimony of George B. Burnham.)

patent suit against the American Potash & Chemical Corporation so that you could get the price up, you attached significance to that, did you?

A. Well, I felt very certain that the American Potash was infringing our patents and the very fact that Zabriskie, who wouldn't cooperate in any way to help us, and incidentally help himself for supporting our infringement suit against the American Potash & Chemical Company, the very fact that he wouldn't cooperate gave me added belief or suspicion that he was cooperating with the American Potash [227] & Chemical Company and cooperating with them to cut the price in order to drive us out of business.

Q. Did you so testify?

A. I did, but I have been thinking about that since I testified to that and I have been wondering a little bit.

Mr. Harrison: May I ask the Court to instruct the witness to answer the question?

The Court: Yes, your attorney can bring that out. It takes too long when you give these long explanations.

The Witness: Yes, that is the way I testified. It is a long time since this occurred.

Q. (By Mr. Harrison): What—the deposition?
A. No, this occurrence.

Q. Yes, since 1928?
A. Yes.

(Testimony of George B. Burnham.)

Q. But the deposition was quite recent, was it not? A. Yes.

Q. And after giving the deposition, you read it over, did you not, for the purpose of making any corrections you desired in your testimony?

A. This more thorough study of this particular situation occurred just recently.

Q. Now, we may pass, I think, Mr. Burnham, to the conversations which you say you had with Mr. Zabriskie—oh, my associate reminds me that the deposition was signed a week ago today. [228] That is correct, isn't it? A. About that.

Q. Now, about these conversations that you testified to with Mr. Zabriskie and Mr. Emlaw on May 17, 1929; when you went to Mr. Zabriskie you accused him, did you not, of cooperating with the American Potash & Chemical Company in the matter of the price cuts in order to injure you and your company? A. On what date?

Q. May 17? A. Yes.

Q. And then after your conversation with him you immediately went over to Mr. Emlaw and accused him, did you not? A. Yes.

Q. You never saw Mr. Zabriskie after that time?

A. No.

Q. You had never before discussed the price cuts with him except in your conversations in December about patent infringement?

A. No, not in that regard.

Q. Well, I would like you to think: Did you ever discuss the price cuts with Mr. Zabriskie before that

(Testimony of George B. Burnham.)

occasion, except your endeavor to get him to put up money in the previous December?

A. No, I don't think I did.

Q. Now, then, you have some diary entries about those conversations, have you not? [229]

A. Yes.

Q. I would like you to produce them, please.

A. The ones on May——?

Q. The ones on May 17? A. Yes.

Q. While you are looking for that, Mr. Burnham, Mr. Zabriskie died within a year or two after this conversation, did he not, early in the 30's?

A. In the 30's some time.

Q. Early in the 30's, didn't he?

A. I believe so. Here is the diary entry.

Q. Yes, before we get to that, let me first ask you this question: You knew at that time that the head of the Borax Consolidated and the Pacific Coast Borax was Mr. R. C. Baker of London, did you not?

A. I knew—? Will you state the question again?

Q. You knew in 1929 when you talked to Zabriskie that the head of the company was Mr. R. C. Baker of London, did you not?

A. I don't remember.

Q. You have heard of Mr. Baker, haven't you?

A. Yes.

Q. And you knew he was the head of the company, didn't you?

A. I could say yes, but I am not quite certain. I think I did see it in the Moody's Manual, or

(Testimony of George B. Burnham.)

Moody's Publication, [230] that he was head of the company.

Q. That was a matter of general trade knowledge, wasn't it?

A. Yes, I believe it was; I wouldn't swear absolutely.

Q. I understand. We will look at those diary entries now, if you please. This has been marked, I think, but in any case on which side of the page is the entry about these conversations?

A. Right here (indicating).

Q. Beginning in the middle of the right hand page?

A. Yes—down here also (indicating).

Q. There are some erasures there in the date, are there not? Is that "May" written over an erasure?

A. Yes, that is written over an erasure, but the erasure occurred at that time.

Q. Well, what is the word that was there before the erasure was made—can you tell?

A. "Talked, t-a-l-k-e-d." The next word is hard to make out. Then I have written over that, "May 17, 1929."

Q. Now, where is the memorandum of the Emlaw conversation? Did that follow the Zabriskie?

A. Yes, and also on the opposite page of Zabriskie—both. The Emlaw conversation starts on May 17, 1929, at the top of the next page.

Q. Is there an erasure of the word "May" in the account of the Emlaw conversation? [231]

A. No, there is not, that I can detect.

(Testimony of George B. Burnham.)

Q. Now, with respect to the Emlaw conversation, I wish you would read to the jury just what your diary states.

A. "Called on Emlaw of the American Potash & Chemical Corporation regarding the selling of concentrated brine. Says brine must have enough $2 \text{ Na}_2 \text{ CO}_3$ to make $3 \text{ Na}_2 \text{ SO}_4$, $2 \text{ Na}_2 \text{ CO}_3$. Refer matter to Burke. Did not discuss patents."

Q. That is all that appears on that page, is it not?

A. Yes, that's right.

Q. And the fact is you did not discuss the patent matter with him as to which you had had that controversy with him in the previous December?

A. That's right.

Q. But you still disbelieved what he had told you the previous December, to-wit, that they were not infringing your patent?

A. Yes.

Q. Now, then, there is nothing on that page relating to price cuts or any accusation or any denial, is there?

A. No.

Q. What other entry do you consider now has any relation to the Emlaw conversation?

A. On the other page it says:

"American Potash & Chemical Corporation
Fitzroy 9620, Whitehall 7240."

Q. Let me interrupt you there: You say, "on the other page." [232] In order that the jury may understand and that the record may be clear,

(Testimony of George B. Burnham.)

will you state what you mean by that? In other words, that isn't on the same page as the note you have given us here; that is two pages earlier and on a page preceding the notes of the Zabriskie conversation? A. Yes.

Q. All right, now, go ahead and tell us what you have written on that earlier page.

A. "Whitehall 7240. 233 Broadway. P.C.B., Beekman 0332."

Q. Those were evidently all telephone numbers and addresses, were they not?

A. Yes. "Emlaw says——"

Q. Is "Emlaw says" immediately below those telephone numbers?

A. With an arrow going from the "American Potash & Chemical Corporation" down to here, to "Emlaw says."

Q. That is written at the bottom of the page?

A. Yes.

Q. Now, will you read the bottom of the page exactly?

A. "Emlaw says not selling. Nothing in it. Would sell if could get offer."

Q. You have read us, have you not, everything in your book that up to the present time relates in your opinion to the Emlaw conversation?

A. That is all I had written at the bottom on the conversation.

Mr. Harrison: Yes. In order that the testimony of the [233] witness may be clear, may we ask this exhibit be shown to the jury for a moment?

(Testimony of George B. Burnham.)

The Court: Yes. Mr. Jones, will you take the book from the witness and pass it to the jury.

The Witness: And there are——

The Court: No, just give the book to the bailiff.

(Thereupon the book referred to was exhibited to the jury.)

The Court: Has this book that has been shown to the jury been identified in any way in the record?

Mr. Harrison: I thought it had been, but we better do it if it has not already been done.

Mr. Carr: I think it has been done, yes.

The Court: Was the one we put the identifying sticker on the back of this book?

The Clerk: Yes.

The Court: Then, it is identified for the record as Plaintiff's Exhibit 1 for Identification.

Mr. Carr: Yes.

Mr. Harrison: Yes.

The Court: We will take an adjournment in this case, ladies and gentlemen of the jury, until next Tuesday morning at ten o'clock. The court has other matters to take up on Monday. I try to dispose of some of these matters we have to hear in the mornings before we go on with this case, but Monday is not even long enough to do that. That is why [234] you have to sit here and wait in the mornings while we hear other matters. However, we do try to dispose of some of those other matters on Mondays. That is why, ordinarily, we do not have juries come in on Mondays.

(Testimony of George B. Burnham.)

I will ask you, then, to return on Tuesday morning at ten o'clock. In the meantime, please bear in mind the admonition heretofore given you, not to talk about this case among yourselves, nor with anyone else on any subject connected with the case, nor are you to form or express any opinion as to what your decision should be until the case is finally submitted to you.

(The further hearing of the cause was continued until Tuesday, April 1, 1947, at 10:00 o'clock a.m.) [235]

Tuesday, April 1, 1947, 10:00 o'Clock A.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Carr: Ready.

Mr. Harrison: Ready.

The Court: Mr. Burnham was on the witness stand.

GEORGE B. BURNHAM

recalled.

Cross-Examination

(Resumed)

Q. (By Mr. Harrison): Mr. Burnham, when court adjourned last week we were talking about your conversations with Mr. Zabriskie and Mr. Emlaw on May 17, 1929. It is a fact, is it not, that

(Testimony of George B. Burnham.)

prior to that time and in the spring of 1929 you had been East for sometime? A. Yes.

Q. Is it not a fact that while you were East, and before the conversations with Mr. Zabriskie and Mr. Emlaw, you called upon some of the stockholders of your company in New York?

A. Yes.

Q. Did you tell those stockholders in New York on that occasion that the price cuts by those defendants had occurred simultaneously and in the very month you started production?

A. Yes, I no doubt told them the historical facts about the company. [236]

Q. And you told them the price cuts had occurred simultaneously and in the very month when your company had started production?

A. I don't know as I used the word "simultaneously," but I used the word in that month, the very month we started production.

Q. You used words to that effect? A. Yes.

Q. Did you also tell them you thought it was a peculiar coincidence that the price cuts had occurred in the very month you started production?

A. Yes.

Q. And that was before your talk with Mr. Zabriskie on May 17, 1929? A. Yes.

Q. Now, after your talk with Mr. Zabriskie on May 17, 1929, did you call upon those stockholders and tell them that some mistake had been made?

A. No.

(Testimony of George B. Burnham.)

Q. Did you tell them of your talk with Mr. Zabriskie?

A. No, because I returned to California shortly afterward.

Q. You returned to California without communicating with those stockholders? A. Yes.

Q. When you called upon Mr. Zabriskie on the morning of May 17, 1929, you accused him, did you not, of conspiring with the [237] American Potash & Chemical Corporation for the deliberate purpose of driving you out of business? A. Yes.

Q. And when you accused Zabriskie of this conspiracy to drive you out of business did you tell the reasons why you were accusing him?

A. Well, I told Mr. Zabriskie, "It looks to me like you fellows were cutting the price of borax purposely, deliberately, to drive the Burnham Chemical Company out of business.

Q. And you called his attention to the fact that the price cut had occurred the very month you started production? A. Yes.

Q. You talked to Zabriskie that morning, and then you went right over to see Mr. Emlaw that afternoon, only taking time for lunch, did you not?

A. Yes.

Q. And when you called upon Mr. Emlaw in the afternoon you accused him of cutting prices in conspiracy with the Pacific Coast Borax for the purpose of injuring your company, did you not?

A. Yes, I wanted to check up on what he would say regarding the matter, and I told Mr. Emlaw

(Testimony of George B. Burnham.)

about the same as I told Mr. Zabriskie, namely, "It looks as though you had cut the price on borax for the deliberate purpose of driving us out of business." [238]

Q. You made that accusation as firmly as you could with politeness, did you not?

A. Yes, that is right.

Q. Did you tell Mr. Emlaw why it was that you believed he and Zabriskie's company were conspiring to drive you out of business?

A. Well, I was pretty much convinced after my long talk with Zabriskie——

Q. You were pretty much—I didn't get the word.

A. I was pretty much convinced after my long talk with Zabriskie——

Mr. Harrison: If your Honor please, I move to strike out that particular statement as not responsive to the question, as to what he told.

The Witness: What was the question again?

Mr. Harrison: Will you read it, Mr. Reporter?

(Question read.)

A. Yes, substantially the same as I told Mr. Zabriskie.

Q. That is to say, it seemed very strange that the price was cut in half the very month your company started production? A. Yes.

Q. And that they knew you were starting production in that month? A. Yes.

Q. Both Zabriskie and Emlaw denied the accusation, did they [239] not?

(Testimony of George B. Burnham.)

A. Yes, they did.

Q. What reply did Mr. Zabriskie make when you accused his company and the American Potash & Chemical Corporation of conspiring against you?

A. He replied that they were not deliberately driving us out of business; they were not trying to injure us, that the price cut was due to an over supply of borax on the market, that the American Potash & Chemical Corporation were making a tremendous amount of borax, and the warehouse was full, and yet they had to sell it to get rid of it. And also that they had made a big production in the Kramer deposits, and that their cost of production would be cheaper because they had a better source of borax.

Q. You have told us as far as you remember all that Zabriskie said on that subject, have you not?

A. On the subject of why the price was dropped.

Q. Yes. A. Yes.

Q. What reply did Mr. Emlaw make when you accused him of conspiring with the Pacific Coast Borax?

A. He also said that there was an over supply of borax, and that his warehouse was full, and that they could not sell it, but they would sell it if they could—if they could just get an offer for it. [240]

Q. I want to get this clearly: the substance of what Mr. Zabriskie gave you as the reason for the cutting of the price was the large production, the over production, and the cheaper source of borax in the Kramer District? A. That is right.

(Testimony of George B. Burnham.)

Q. And the substance of the reply that Mr. Emlaw made was that they had an immense production, and that their production had gone up by leaps and bounds? A. Yes.

Q. Now then, neither Mr. Emlaw nor Mr. Zabriskie gave you any actual production figures did they? A. No.

Q. They spoke only in generalities?

A. That is right.

Q. Yes.

A. Well, I might say this: Zabriskie said if we could produce—if the production was 300,000 tons of borax per year, that is, if they could make the demand equal to 300,000 tons, they would make more money in the end.

Q. But what I am asking, Mr. Burnham, is whether they gave you any actual figures or statistics as to production at that time?

A. No, no actual statistics.

Q. They spoke only in generalities?

A. Yes. [241]

Q. As a matter of fact, you knew before you ever had those talks with Emlaw and Zabriskie that the production was large, did you not?

A. Yes.

Q. And you had already obtained on your trip east precise information about the amount of production, had you not?

A. Well, I had gathered some information on that subject.

Q. Some information with figures, had you not?

(Testimony of George B. Burnham.)

A. That the production was very much greater in the year of 1928 than it was in 1927.

Q. So when you went to see those gentlemen on May 17 you knew there was overproduction and a large amount overhanging the market, did you not?

A. Yes, but I could not understand why there should be such a cut in the price of borax the very month we started production.

Q. You also knew that the Kramer deposit, which belonged to the Pacific Coast Borax, was practically clear of borax, requiring very little expense to mine or remine, did you not?

A. Yes.

Q. So that you knew when you went to see Mr. Zabriskie that morning that the Kramer deposit was a cheaper source than had theretofore existed, did you not?

A. Yes, I know in a general way that it ought to be a cheaper source of borax, except that if a large production is made at [242] Searles Lake and borax is treated as a byproduct, it could be a cheaper source—as cheap a source of borax.

Q. But as far as the then methods are concerned, you knew that Mr. Zabriskie's company had found a cheaper source of borax than they ever had before? A. Yes.

Q. And that is what Mr. Zabriskie told you that morning, was it not? A. Yes.

Q. You knew also that the American Potash & Chemical Company process by which both borax and potash were taken was of such a kind that if

(Testimony of George B. Burnham.)

they produced potash they would necessarily produce borax? A. Yes.

Q. And the only thing they told you that morning that you did not already know was their denial that they had deliberately done this price cutting for the purpose of driving you out of business, isn't that true?

A. Well, except for this: I could not understand why it should go so low, even though there was an over supply. I could not understand why it should go down so low as \$13 a ton in bulk.

Q. So you still felt, after you had left them, after they had told you these facts you already knew, and after they denied the charge that they were conspiring, you still thought it [243] was strange that it should have gone so low, did you not?

A. No, after my talk with Mr. Zabriskie, I was very much—I was completely convinced that it was absolutely genuine competition.

Q. I want to call your attention, Mr. Burnham, to this letter which has been introduced in evidence as Defendants' Exhibit K, which was the letter to you from Mr. Townsend dated November 13, 1928; you remember that? A. Yes.

Q. And particularly to the paper that was attached to that, which has been marked Defendants' Exhibit L, entitled "Application of Federal Trade Commission Law to Borax Trade Conditions." Have you that before you?

A. No, I haven't it before me.

(Testimony of George B. Burnham.)

Q. I want to call your attention to these provisions in that letter, these statements:

“For about three years, and particularly during the past year, a persistent price war has been waged in the borax trade, until the price has been reduced to a point below actual cost of production, if all of the actual elements of production-cost are included in the computation, and the methods of computation are otherwise correct.

“This situation imperils the continued existence of competition in the borax trade and will ultimately lead to the establishment of an absolute trust, if the causes of [244] the situation are not terminated.”

And then follows this sentence: “Various excuses and explanations are offered by those responsible for the situation, but it is quite evident that these excuses and explanations are mere cloaks and disguises, and that an adequate investigation of the subject will develop proof that this situation is the natural and inevitable result, and therefore the very object and purpose, of trade practices which are in violation of the Federal Trade Commission Act, also the Federal Antitrust Laws.”

When you received that letter in November, 1928, six months before the Zabriskie conversation, what did you understand was the meaning of the term “various excuses and explanations,” which were

(Testimony of George B. Burnham.)

“mere cloaks and disguises” according to Mr. Townsend?

A. That question was discussed, and it was discussed very lengthily between our directors, and also the officers of the West End Chemical Company, in the latter part of November——

The Court: No, all he wanted to know was what did you understand to be the meaning of those terms?

Mr. Harrison: When you received that letter.

A. The distribution of cost of production of borax over potash was a matter of bookkeeping, and the American Potash & Chemical Company were probably figuring that their cost of borax was almost nothing, because it was a by-product, that is, they could [245] make that statement. The question was whether it really is correct to figure that borax is a by-product or not.

Q. (By Mr. Harrison): Are you finished, Mr. Burnham? A. Yes.

Q. I would like you to think it over a while, and isn't it true that when that letter come to you in November, 1928, you understood that to refer to other excuses than the mere matter of accounting?

A. There was one other excuse, that is, whether or not the Kremer deposits could produce as cheap, so cheaply.

Q. One of the excuses which Mr. Townsend considered a mere cloak and disguise was the fact that the Kremer deposit was a cheaper source of supply?

A. That was a question then: that the Kremer

(Testimony of George B. Burnham.)

deposit had only fairly recently been opened up, I think it was 1927.

Q. Wasn't it 1926, about the end of 1926?

A. Well, it might have been the end of 1926 or the early part of 1927.

Q. And this was the end of 1928?

A. Yes, a year and a half later.

Q. And you understood that one of the excuses which Mr. Townsend referred to as being a mere cloak and disguised was the claim that the Kremer field was a cheaper source of supply for borax, did you not?

A. Well, I understood that was what Mr. Townsend contended. [246]

Q. And that was also one of the statements made to you by Mr. Zabriskie in May, 1929, as an excuse or explanation for the price cut, was it not?

A. Yes.

Q. Isn't it true when you got Mr. Townsend's letter in November, 1928, you understood that another explanation or excuse that was being given which he considered to be a mere cloak and disguise was the production of borax?

A. Mr. Townsend might have had that in mind.

Q. Didn't you so understand it at the time?

A. I don't remember that I did.

Q. May I refresh your recollection by your deposition, if you will turn to page 446 of the deposition, I will ask you if you testified as follows; 446 line 17:

A. 446, line 17?

(Testimony of George B. Burnham.)

Q. Yes. I will read to you and ask if you testified as follows.

“Q. What was the various excuses and explanations offered by those people or referred to?”

Counsel was examining you about this letter.

“A. Well, he was probably referring to the fact that there were improved processes for making borax and thereafter the price went down; also because the Kremer field was a cheaper source of borax supply, and that would cause the price to be reduced, and also because there was an over-supply of borax on the market. Those conditions [247] could naturally result in a price reduction, and those might have been the reasons that our competitors were giving as the reason for the price drop.

Q. And to the best of your recollection now, what you have just said were the various excuses and explanations offered for the price cut at that time? A. Yes.

Q. The various excuses and explanations which are here referred to? A. Yes.”

Did you so testify? A. Yes.

Q. Now, then, at the time the Zabriskie conversation occurred on May 17, 1929, there was actual litigation between your company and his company, the Pacific Coast Borax Company, one of the defendants here, before the Land Office, with respect

(Testimony of George B. Burnham.)

to your rights to obtain a lease in the Little Placer property, was there not? A. Yes.

Q. And that litigation had actually been set for a contested hearing before the Land Office when you had your conversation with Mr. Zabriskie in May, 1929? A. Yes.

Q. The Little Placer was a property down in the general Kramer District, was it not?

A. Yes. [248]

Q. Of the same general character as the property being operated in the Kremer District by the Pacific Coast Borax Company? A. That is right.

Q. And your company and the Pacific Coast Borax Company were in litigation at that time as to who was entitled to the Little Placer?

A. Yes.

Q. During that conversation on May 17, 1929, there was some reference to the subject of patent infringement, was there not, in the talk with Mr. Zabriskie? A. What was that question again?

Q. There was some reference to your claim that the American Potash & Chemical Company had infringed your patents, the claim as to which you had asked Mr. Zabriskie's help in the previous December, and as to which you were suspicious because he had not helped you?

A. This is at our meeting in 1917.

Q. I am asking you whether in your conversation in May, 1929, that claim for patent infringement was referred to. A. Yes, it was referred to.

(Testimony of George B. Burnham.)

Q. And you at that time repeated your statement that you believed that the American Potash & Chemical Corporation were infringing your patent? A. Yes.

Q. But when you talked to Mr. Emlaw the same day you did not [249] say anything about that claim for infringement?

A. No, I didn't want to rile up Mr. Emlaw again on that subject. I wanted to get his cooperation.

Q. You had had a rather heated interview with Mr. Emlaw the previous December, had you not?

A. That is right.

Q. In which he became quite angry?

A. Yes.

Q. And in which he denied that there was any patent infringement? A. Yes.

Q. And at that time you did not believe this denial, did you?

A. No, because I felt very strongly that they were infringing our process.

Q. Now, then, I would like to direct your attention to January, 1930, Mr. Burnham, that is about eight months after your conversation with Mr. Zabriskie and Mr. Emlaw; there was a hearing up at Carson City, was there not, on your application for temporary injunction in the suit which you had brought against the Postmaster to enjoin the enforcement of the Fraud Order? A. Yes.

Q. That was a three-day hearing, was it not?

A. I believe so.

(Testimony of George B. Burnham.)

Q. You were present in court at the time?

A. I was. [250]

Q. And Mr. Townsend presented the case as your lawyer in court before Judge Norcross, at Carson City, did he not?

A. Mr. Townsend and Mr. Lunsford.

Q. On that occasion and during that hearing did you sign and was there filed an affidavit of which I now show you a copy? (Handing a document to the witness.) Do you recall that affidavit?

A. Yes.

Q. You signed it and swore to it under oath, did you not? A. Yes.

Q. And that affidavit was used in support of your application for temporary injunction in those court proceedings, was it not?

A. That is right.

Q. And also the amended complaint, which has already been introduced in evidence, the amended complaint in that suit? A. Yes.

Mr. Harrison: We offer the affidavit in evidence if the Court please.

(The affidavit in question was thereupon received in evidence and marked Defendants' Exhibit P.)

Mr. Harrison: Ladies and gentlemen of the jury, I will read certain portions of this affidavit. If Mr. Carr wishes to read others he may. This is entitled in the case of Burnham Chemical Company against George Smith as Postmaster: [251]

(Testimony of George B. Burnham.)

“Affidavit in Support of Motion for
Temporary Injunction

State of Nevada,
County of Washoe—ss.

George B. Burnham being first duly sworn,
deposes and says:

1. The following portions of the amended
complaint in the above-entitled action are true
to affiant's own personal knowledge:

“All of paragraph I;

“All of paragraph II, excepting subdivision
(b) thereof, which is a question of law, and
which affiant believes to be true.

“All of paragraphs III, IV, V, and VI.

“All of paragraph VII, excepting subdivision
(f) and (g), and the last sentence in subdivi-
sion (i), which are stated upon information and
belief, and affiant believes them to be true.

“Subdivisions (c), (d), (e), (f), (g), except
the allegations therein stated to be made upon
information and belief, (h) and (j) of para-
graph VIII.

“All of paragraph XII.

“All of paragraphs XXVIII and XXX.”

Q. That refers, does it not, Mr. Burnham, to
the amended complaint which you had filed in this
case and which has been introduced in evidence
here? [252]

(Testimony of George B. Burnham.)

Q. And the one which you printed and sent to your stockholders? A. That is right.

Mr. Harrison: In order that that meaning may be clear, I should like to read to the jury certain passages from paragraphs XXVIII and XXX, which the affiant here states to have been made upon his personal knowledge. If you will take that and follow with me, I will use my copy, Mr. Burnham.

Mr. Harrison: I will hand that copy to the Clerk. Paragraph 28 referred to as being true of the witness' own knowledge is entitled: "Attitude of Stockholders Since Issuance of Fraud Order."

Subdivision (c) of that same paragraph which the affiant stated was true of his own knowledge reads as follows:

"Many of them——"

referring to the stockholders——

"have conveyed information to the effect, which plaintiffs believe to be true, and upon such information and belief allege the fact to be, that the issuance of the fraud order was procured and induced by dishonest and fraudulent intrigues and machinations on the part of the competitors of the Burnham Chemical Company, and particularly the 'Borax Trust.'"

And Paragraph 30, which he states is true of his own knowledge is entitled: "Additional Facts Concerning Efforts of Borax Trust to Preclude Development Solar Process; Concealment Thereof from Solicitor and Postmaster-General."

(Testimony of George B. Burnham.)

As part of the paragraph it is stated that:

“Plaintiff’s allege that by their unlawful violation of their contractual obligations, and their subsequent unlawful assertion of rights adverse to Mr. Burnham as hereinbefore stated, the Pacific Coast Borax Company and the Solvay Process Company intended, and attempted, to [253] render Mr. Burnham financially helpless and permanently preclude the development of the Burnham Solar Process, for the reason that it would virtually destroy the value of existing plants, constructed and installed to operate under more expensive processes, with an investment exceeding \$30,000,000.”

Mr. Carr: Is that subdivision 8?

Mr. Harrison: No, that is subdivision (h) on Page 76.

Mr. Carr: Thank you.

Mr. Harrison: Now, referring to Paragraph I:

“The Pacific Coast Borax Company also endeavored to preclude the development of the Burnham Solar Process, by means of their application for a lease of virtually all of the public land at Searles Lake, suitable for solar ponds, as heretofore stated. Had said application been granted it was the intention of the Pacific Coast Borax Company to construct solar ponds covering said entire area of 3,100 acres; and such ponds would have been of sufficient capacity to have enabled the Pacific Coast Bo-

(Testimony of George B. Burnham.)

rax Company, within five years, to have exhausted the entire chemical deposits of Searles Lake, and to have transferred it to the ponds of the Pacific Coast Borax Company; and thereby the Pacific Coast Borax Company would have secured virtually a permanent monopoly of the production of potash and borax in the United States, so far as concerns the [254] present known deposits thereof. It was upon this ground, among others, that Mr. Burnham protested against, and the Secretary of the Interior denied, said application for lease by the Pacific Coast Borax Company, acting through its subsidiary as hereinbefore stated."

Now, continuing with the affidavit which has been introduced in evidence, it is stated in the next paragraph at the bottom of Page 1:

"Also a large portion of the other allegations contained in the amended complaint, but which are too numerous to be listed in this affidavit; most of which show upon their face to have been based on the knowledge of affiant, particular attention being directed to the many allegations made in refutation of the charges, findings, statements and other acts of inspectors, attorneys and others who took part in the preferment of such charges, and in the conduct of the so-called hearing thereof."

(Testimony of George B. Burnham.)

Turning to Page 3, Line 19, the affidavit states:

“At the commencement of this affidavit, affiant stated that certain portions of the amended complaint are true as affiant’s personal knowledge. To the end that there may be no misunderstanding: as to the matters in the amended complaint which are not within the personal knowledge of affiant, affiant is reliably informed that they are true, and verily believes them to be true.” [255]

The matters to which we want to call the Jury’s attention as to which the affiant stated in this affidavit he believed to be true were all read to the Jury the other day, but I would like to ask the witness about one of these statements which he swears in this affidavit he believed to be true.

Q. I call your attention, Mr. Burnham, to the fact that in the amended complaint on Page 24——

Mr. Carr: Page 24?

Mr. Harrison: Yes, Page 24, Lines 11 to 20, the following statement is made, which was one of those in January of 1930, Mr. Burnham, you said you believed to be true.

Mr. Carr: Page what?

Mr. Harrison: That is the amended complaint.

Mr. Carr: Yes, but what page?

Mr. Harrison: Page 24, Line 11.

Mr. Carr: Yes.

Mr. Harrison: I am quoting now:

“That the difficulties encountered by Mr.

(Testimony of George B. Burnham.)

Burnham in marketing said small amount of borax then on hand were created by the afore-said competitors of the Burnham Chemical Company for the express purpose, among other things, of discrediting the Burnham Chemical Company and furnishing some false and fictitious ground upon which a fraud order could be based; and that said monopolistic restraint of the commerce in borax was and is a flagrant [256] violation of the laws of the United States, and could and should be penalized and prohibited by criminal and civil proceedings instituted by the United States; and Dr. Stewart further knew that said circumstances demanded the prosecution of the Borax Trust under the Antitrust Laws of the United States, but did not warrant or justify the prosecution of the Burnham Chemical Company or Mr. Burnham under the Postal Laws of the United States."

Q. I think you have testified, Mr. Burnham, the use of the term "Borax Trust" referred to these defendants, did it not?

Mr. Carr: Which defendants?

Mr. Harrison: The defendants American Potash & Chemical Company and Burnham Chemical Company.

The Witness: In the colloquial sense.

Mr. Carr: What was that?

Mr. Harrison: He says "in the colloquial sense."

(Testimony of George B. Burnham.)

Mr. Carr: He referred to the American Potash——

Mr. Harrison: American Potash & Chemical Company and Burnham Chemical Company.

Mr. Carr: Yes, and P.C.B.

Q. (By Mr. Harrison): Before we get to the sense in which it is used, when you used that particular language, "The Borax Trust," you did mean these two companies? A. Yes.

Q. Did I understand you to say that was used in the colloquial sense? [257]

A. Yes, that was the common expression for the two companies; in fact, all over Europe they called them "The Borax Trust," but not with any knowledge they were violating the Antitrust Laws of the United States.

Q. Isn't it a fact you used the word "Trust" in this sense to designate people who were violating the Antitrust Laws?

A. This is what Dr. Stewart contended.

Q. Oh, so that was it. You claim that Dr. Stewart knew that the circumstances demanded the prosecution of the Borax Trust under the Antitrust Laws?

A. Mr. Townsend drew this up. I believe that was what he had in mind.

Q. You read this, of course, before you signed it?

A. Yes, I read it over and Mr. Townsend asked me to sign it and I signed it, and I believed that

(Testimony of George B. Burnham.)

all these things—I did not affirm in my deposition—in my affidavit on January 14, 1930.

Q. I want to be fair with you, Mr. Burnham: I will read you that again. This is a passage from your affidavit of January, 1930:

“At the commencement of this affidavit, affiant stated that certain portions of the amended complaint are true of the affiant’s personal knowledge.”

You specified certain paragraphs, did you not?

A. Yes. [258]

Q. And you also said under oath:

“To the end that there may be no misunderstanding: as to the matters in the amended complaint which are not within the personal knowledge of affiant, affiant is reliably informed that they are true, and verily believes them to be true.”

You read that affidavit before you signed it?

A. Yes, but that belief is not based on any knowledge.

Mr. Carr: What was the answer?

Mr. Harrison: He says, “That belief was not based on any knowledge.”

Mr. Carr: Yes.

Q. (By Mr. Harrison): But it was your belief?

A. Based on the opinions of others, but the others didn’t have any knowledge either.

Q. You don’t know whether they had any knowledge or not?

(Testimony of George B. Burnham.)

A. I know Townsend had no knowledge.

Q. But you believed those to be true in January of 1930, did you not?

A. I had good reason to believe that they were true, but I did not have any knowledge whatsoever that they were true.

Q. But you believed them to be true?

The Court: Well, he signed the paper in which he said that.

Mr. Harrison: Yes, your Honor. [259]

Q. Now, do you recall the year 1933?

Mr. Carr: Have you finished with that?

Mr. Harrison: I will withdraw that last question.

Q. Your belief on this subject in 1930 was just as strong as it ever had been, was it not?

A. No.

Q. You signed this affidavit about your belief six months after your conversation with Mr. Zabriskie, did you not? A. Yes.

Q. Now, I want to continue reading the affidavit, Mr. Burnham. This is the affidavit still of January, 1930, Page 6 and Line 26. A. Yes.

Mr. Carr: What was the page again?

Mr. Harrison: Page 6 and Line 26, Mr. Carr:

“As our plan was completed, and our operations begun, the price of borax was still further reduced until, by the time affiant was ready to market its product, the price had been reduced as low as \$38 per ton, and the Burnham

(Testimony of George B. Burnham.)

Chemical Company could not make a profit at that price with a plant of only 5,000 tons capacity per annum; although it could have made a profit with its process, if operating a plant of 50,000 tons capacity; one of our competitors operated a plant of that capacity, on Searles Lake, during 1928, and thereafter. [260]

“It will be observed that deducting the cost of transportation from \$38 left only \$18; and from the latter sum, \$6 per ton must be deducted for the sacks which must be used in shipping borax. This left only \$12 net for the producer. The competitor of the Burnham Chemical Company at Searles Lake, which was largely responsible for this reduction in price, was producing approximately 50,000 tons of borax and 100,000 tons of potash per year. Affiant is of the opinion that such competitor could not and did not sell borax at such a low price, without a loss, unless an undue portion of operating expenses was charged to potash.”

Q. That competitor was the American Potash & Chemical Company?

A. American Potash & Chemical Company, yes.

Mr. Harrison: (Reading):

“Moreover, affiant learned, and states the fact to be that such competitor was using, and is still using, some of the essential and basic patents of the Burnham Chemical Company; and notice of infringement was duly served

(Testimony of George B. Burnham.)

after information thereof had been received. Affiant is informed and advised by the patent attorney of the Burnham Chemical Company that the operations of such competitor have been and now are clearly in violation of the patent rights of the Burnham Chemical Company; prosecution of suit for relief has been delayed because of lack of [261] funds.

“Affiant further states that except for the fact that said competitor was using the process covered by our company’s patents as afore-said, such competitor would not have been able to produce borax except at a cost greatly in excess of their present cost. Thus, the effect is that our patents have been used against us, to destroy us, at the time when our plant was completed and we were ready to operate.

“The immediate effect of this price war was to compel the Burnham Chemical Company to suspend operations at the end of the year 1928. It appears quite certain that this price war was intended to be only temporary, to accomplish some object beneficial to the authors thereof, and that normal prices will ultimately be restored.”

Q. In connection with that statement, I would like to ask you this question: When Mr. Zabriskie told you about over production you did not believe that was a temporary condition, did you?

A. What was the date of that?

(Testimony of George B. Burnham.)

Q. I am asking you about the Zabriskie conversation of May 29, when he told you that for every so many tons of potash that the American Potash & Chemical Company produced they had to produce so many tons of borax, you knew that was a permanent condition, did you not? [262]

A. Yes—no, I would like—

Q. And when he told you in May, 1929, that the cost of production at the Kramer deposit was a cheaper source than they had before, you knew that was a permanent situation, did you not?

A. Yes—I might add a little correction to that: production of American Potash & Chemical Company, it is true that for every three or four tons of potash that they produced, they produced about two tons of borax, but that doesn't mean it could always be permanent. They could redesign the plant.

Q. But there was no indication in May, 1929, it was temporary? It gave every indication of being permanent, did it not? A. Yes.

Q. Further, when you said in your affidavit of January, 1930: "It appears quite certain that this price war was intended to be only temporary, to accomplish some object beneficial to the authors thereof," you didn't have in mind the cheaper source of Kramer or the over production?

A. Read that again.

Q. Yes, I will read the two sentences again:

"The immediate effect of this price war was to compel the Burnham Chemical Company to

(Testimony of George B. Burnham.)

suspend operations at the end of the year 1928.

It appears quite certain that this price war was intended to be only temporary, to accomplish some object beneficial to the authors thereof, [263] and that normal prices will ultimately be restored."

You have my question, have you?

A. What was the question?

Q. The question is this: When you refer to the fact that the price war was intended to be only temporary to accomplish some object beneficial to the authors thereof, you did not have in mind the mere matter of cheaper production at Kramer that was permanent, or the mere matter of necessary production of borax in connection with potash, which was a permanent condition as far as you then knew?

A. The question is a little bit involved.

Q. If it is not clear I will withdraw it and ask you another question.

When you said that "It appears quite certain that this price war was intended to be only temporary," you meant, did you not, that it was intended by the American Potash & Chemical Company and the Pacific Coast Borax Company to be only temporary?

A. I don't know yet exactly what you are driving at.

Q. Perhaps I am not clear and I will withdraw the question and ask you another one.

A. This is my affidavit of January, 1930?

(Testimony of George B. Burnham.)

Q. Yes, your affidavit of January, 1930.

A. My affidavit of January, 1930, all right.

Q. At that time you said, "It appears quite certain that [264] this price war was intended to be only temporary." Whose intention were you referring to there?

A. The American Potash & Chemical Company and the other producers of borax.

Q. And the Pacific Coast Borax Company was the principal other producer, was it not?

A. Yes.

Q. Now, I would like to ask you to direct your attention to a statement in this affidavit on Page 9, Line 6:

"But our stockholders have reached the point where they insist unsurmountable handicap of the fraud order shall be removed. The far reaching injuries caused by this fraud order are too obvious to require specification. One incident will illustrate an injury which could hardly be anticipated. In June, 1928, the Burnham Chemical Company applied for a permit for some borax-bearing lands in the so-called Kramer District. Our application was contested; and the contest was tried before the United States Land Office at Los Angeles during July, 1929. Affiant was the first witness called in behalf of the Burnham Chemical Company, to prove the formal matters pertaining to our application. When affiant was turned over for

(Testimony of George B. Burnham.)

cross-examination, he was confronted with a certified copy of the fraud order, which was introduced in evidence for the stated purpose of impeaching the credibility and integrity of affiant and the Burnham Chemical Company. That certified copy was issued by the Post Office Department, with the approval of the Solicitor's Office, as shown by the initials endorsed thereon, which included the initials of Calvin W. As-sell, the attorney in the Solicitor's Office, who prosecuted the charges against the Burnham Chemical Company, as particularly set forth in the amended complaint."

In connection with those statements, I will ask you if you did not know at this time that damage had been caused to the plaintiff by reason of the Post Office fraud order?

A. I knew we were damaged all right.

The Court: We will take the morning recess at this time, ladies and gentlemen of the Jury. Please bear in mind the admonition of the Court as heretofore given to you.

(Recess.) [266]

Q. (By Mr. Harrison): I call your attention now to a paper that is dated November 6, 1925, addressed to "Dear Stockholder," and ask you whether that is a copy of a circular letter which you sent to all of your stockholders on its date.

A. Yes.

(Testimony of George B. Burnham.)

Q. And that is signed by you, Mr. Burnham?

A. Yes.

Mr. Harrison: We offer this in evidence as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit Q.)

Mr. Harrison: Defendants' Exhibit Q, ladies and gentlemen of the jury, which the witness said is a circular letter sent to the stockholders on November 6, 1925, addressed "Dear Stockholder," begins with the statement, "We have not yet begun to fight," and contains before the capitals this statement:

"No unjust action against this company has even the faintest chance of success. The company is ably defended, ably managed, aggressively going forward on the highroad to production of borax on a huge scale," and then in capitals, "and that is the very reason our competitors apparently instigated an unjust Post Office action against us—apparently they see the handwriting on the wall—they fear that the new Burnham plant is going to lead the world in borax production!" [267]

In that statement, Mr. Burnham, the words "our competitors" refer to the American Potash & Chemical Company and the Pacific Coast Borax Company, do they not?

(Testimony of George B. Burnham.)

A. I no doubt had them in mind.

Q. You told us about the interview with Mr. Enlaw on May 17, 1929. Had you ever had any personal conversation with Mr. Enlaw before this conversation with him in the previous December about the patent infringement?

A. I don't remember right now. I might have but I don't remember.

Q. You do not remember any conversation you had with him before December, 1928, so far as you can recall now?

A. As far as I can recollect right now.

Q. And you had no conversation with him between the time you called on him in December, 1928, and this conversation on May 17, 1929?

A. No.

Q. And the conversation of December 28th you have already described as having to do with that dispute about the patent? A. Yes.

Q. I call your attention to the affidavit which you filed in this case, and which you printed and distributed to your stockholders, and which was sworn to by you on February 19, 1946. I am referring for convenience to the printed copy which you have. [268]

Mr. Carr: What is the number of that?

Mr. Harrison: That is his affidavit in this case. I have not introduced it in evidence.

Mr. Carr: Pardon me.

Q. (By Mr. Harrison): I will ask you whether

(Testimony of George B. Burnham.)

on page 3 of the printed affidavit you swore to this statement:

“May 19, 1933. The Department of the Interior through its General Land Office at Los Angeles, California, finally denied plaintiff’s application for a lease on the Little Placer claim, which said plaintiff was counting on as a source of crude borax to renew the operations of its borax factory at Searles Lake. Affiant felt so reasonably certain that plaintiff would obtain the Little Placer claim that affiant’s suspicions were again aroused when its application for the Little Placer claim was denied. Affiant believed that probably defendants or some of them were violating the Antitrust Laws because if Defendant United States Borax Company finally acquired patent to the Little Placer claim, it would tend to further increase its monopoly of sodium borate in the said Kremer District.”

That is included in the affidavit you made, is it not? A. Yes.

Q. It is a fact, is it not, that your suspicions against the defendants were aroused again on about July 30, 1934? [269] A. Yes.

Q. What was it that then aroused your suspicions on July 30, 1934?

A. I had just learned that the Pacific Borax Group had purchased the borax property of the Western Borax Company, had just made or were just about to make a deal with the Sukow Borax

(Testimony of George B. Burnham.)

Company to acquire their borax, that is, a long term lease arrangement, and also that it looked doubtful that we would get the Little Placer, and that the Government was just about ready to give the United States Borax Company a patent on the Little Placer. In other words, on July 30, 1934, I realized that the Pacific Coast Borax group were getting almost a complete monopoly of the Kremer borax district.

Q. The Pacific Coast Borax Group, as you understood it, included the Borax Consolidated, Ltd., one of the defendants in this case, and the United States Borax Company, and also the Pacific Coast Borax Company, itself, is that true?

A. Yes, and one or two other companies.

Q. But certainly the defendants in this case?

A. Yes.

Q. We talked about the Kremer District; that is situated in San Bernardino County, in this State, is it not? A. Yes—Wait, Kern County.

Q. Excuse me, in Kern County, and borax obtained there from the ground, from mines, as distinguished from the source in [270] Searles Lake, where it is extracted from the lake brine, isn't that true? A. Yes.

Q. These discoveries of sodium borate in the Kremer District were made about 1925, were they not? A. Yes.

Q. And operations began in the Kremer District about 1926 or about the end of 1926 or the early part of 1927? A. Yes.

(Testimony of George B. Burnham.)

Q. Before you made these discoveries in July of 1934, or thereabouts, there were three companies operating in the Kremer District, were there not, that is to say, the Pacific Coast Borax Company had its mine and the Western Borax had its mine, and Dr. Suckow or his company had his mine?

A. Yes.

Q. There were three mines? A. Yes.

Q. So in 1934 you discovered that the Borax Consolidated group, including the Pacific Coast Borax and the others, had acquired the Western property and had made some arrangement with the Suckow people and were about to get the Little Placer? A. Yes.

Q. And that aroused your suspicion and belief that they, having succeeded in doing those things, were about to acquire a monopoly of the sodium borate deposits?

A. It aroused my suspicions. [271]

Q. With respect to the brine source of deposit, the only place where brine borax was produced in any large quantity was from Searles Lake, itself, isn't that true? A. Yes.

Q. And the greater part of the operations on Searles Lake had been conducted for many years by the other defendant, American Potash & Chemical Corporation, isn't that true? A. Yes.

Q. Your suspicions having been aroused against these defendants on July 30, 1934, you consulted your attorneys, did you not? A. Yes.

Q. At that time Mr. Heney had been appointed

(Testimony of George B. Burnham.)

a judge of the Superior Court of Los Angeles County? A. That is right.

Q. It was Judge Heney? A. Yes.

Q. You went to see him? A. That is right.

Q. And you also went to see Mr. B. D. Townsend, his associate, who had appeared for you in the suit in Nevada? A. Yes.

Q. You have a note in your diary under date of July 30, 1934, with reference to your conversation with Mr. Townsend, have you not? [272]

A. That is right.

Q. Will you produce and read it to the jury, please?

Mr. Carr: What is the date?

Mr. Harrison: July 30, 1934.

The Witness: Yes, I found it now.

Q. (By Mr. Harrison): We read some of that to the jury the other day, and if you will check with me I will read the part that has already been read and you can go on from there, in order to save time:

“Senator Wagner, of New York, advocates redistribution of wealth. Senator Nye fighting the administration. July 30, 1934. Discussion with B. D. Townsend Kremer case and suit against the Pacific Coast Borax Company for the patented land, claiming that it is held in trust for us.”

That is the land they held in the Kremer District, isn't it? A. Yes.

Q. And that is a memorandum of a discussion

(Testimony of George B. Burnham.)

with Mr. Townsend about the possibility of suing the Pacific Coast Borax for that land?

A. Yes.

Q. On the ground it was held in trust for you?

A. Yes.

Q. "Replacement theory of P.C.B. knocked out," and then there are some passages about geological facts, and then there is the note: [273]

"Take set of documents to New York."

A. I don't see about the geological facts.

Q. Perhaps not. Perhaps that is my error. There is a statement there, "Take set of documents to New York."

A. To Washington, D. C.

Q. You were planning at that time to go to Washington, D. C., were you not? A. Yes.

Q. "Look in the bank deposit vault for the Mather letter, B. C. Company vault or G. B. B. vault"—that is Burnham Company vault, or George B. Burnham vault? A. Yes.

Q. "Townsend said could use Mather letter." We referred to that the other day, did we not?

A. Yes.

Q. Proceeding further, "Possible alternative attorney, H. Stanley Hendricks in the Southern Building, suggested by Townsend. Worked with Townsend in Government cases." That represents the suggestion by Mr. Townsend? A. Yes.

Q. That you might employ Mr. Hendricks?

A. That is right.

Q. And you recalled the fact that Mr. Townsend

(Testimony of George B. Burnham.)

had written Mr. Hendricks back in July, 1928, about the price cuts, had he not? [274]

A. Yes.

Q. "Townsend headed for recovery," is the next note. A. That is right.

Q. That refers to his health? A. Yes.

Q. "Says 25 or 33 percent interest may be necessary." That refers to his compensation, I suppose, does it? A. Yes.

Q. "Townsend thinks Wheeler, of Montana, might be interested to help us as he has socialistic tendencies"—If I am wrong in any of this tell me—"Norris, of Nebraska, and Johnson, of California, might help us. Heney would help us through Johnson. Believes Norris, of Nebraska the best. Couzens, of Michigan, might help. Has his money in non-taxable Government bonds. Townsend thinks Wagner might be too drastic. Going to see if I can arouse the interest of several other senators to back you."

That represented a statement of Mr. Townsend to you?

A. Yes, that is in quotation marks.

Q. That is in quotation marks, and those other statements about senators represented suggestions of Mr. Townsend, did they?

A. Yes, that is correct.

Q. "Believes Nye would be good, too, but take up with him new head of the Public Lands Committee. Get more information [275] from Zuckow about the price of borax."

(Testimony of George B. Burnham.)

You had been talking, had you not, and continued to talk with people connected with the Suckow Company about the acquisition of their properties by the Pacific Coast Borax Company, Mr. Burnham?

A. Yes, I had talked to Suckow, and I understood that they were making a deal with the Pacific Coast Borax Company, a long-time lease on their property.

Q. And that was one of the circumstances that aroused your suspicion? A. Yes.

Q. Going on with the notes, there: "McAdoo might be good. Took a shot at P. C. B. Neblitt sets up a charge of monopoly." That refers to a statement to you by Mr. Townsend? A. Yes.

Q. And he told you, did he not, that Mr. Neblitt, who was Senator McAdoo's partner, in a hearing of a Senate Committee had charged the Pacific Coast Borax Company with monopoly?

A. I don't remember any details except he said Neblitt had charged monopoly.

Q. You knew that Mr. Neblitt was Senator McAdoo's partner, did you not?

A. I can't remember.

Q. As a matter of fact, didn't you make a note about Mr. Neblitt's name at a later part of your diary?

A. Yes, I may have done that. I guess they are connected in some way.

Q. Your attention had been called to the fact that Mr. Neblitt had publicly charged the Pacific

(Testimony of George B. Burnham.)

Coast Borax Company with being an illegal monopoly, isn't that a fair statement?

A. Yes, I think Townsend may have said that there had been some——

Mr. Carr: You are referring to this conversation——

Mr. Harrison: With Mr. Townsend.

Mr. Carr: Yes, only to that, not the statements made by other parties.

Q. (By Mr. Harrison): Mr. Townsend certainly told you that, didn't he?

A. Townsend said that Neblitt had charged them with monopoly, yes.

Q. And he also told you McAdoo had taken a shot at the P.C.B., didn't he?

A. I don't quite remember about that. It isn't here.

Q. Will you read me what it says about McAdoo?

A. "McAdoo might be good—" Oh, that is right. "Took a shot at the P.C.B." But I didn't know what he took a shot at him on.

Q. That is immediately followed by the statement that, "Neblitt sets up a charge of monopoly," isn't that right.

A. Yes, that is right.

Q. Did you know at that time Mr. Neblitt was acting as [277] counsel for a committee investigating monopolies in Southern California?

A. Well, I didn't know much about it. I hadn't been in Los Angeles for a year and had not followed it very closely.

Q. Did you find out from the newspapers in San

(Testimony of George B. Burnham.)

Francisco which you received that such charges had been made public at that time?

A. My memory is very vague on that, I don't know.

Q. Let us go ahead then.

"Ickes is Secretary of the Interior" is the next item, is it not? A. Yes.

Q. And the next item is, "Get copy of Borax Consolidated vs. Suckow, et al., United States District Court, Post Office Building, Public Document filed," also by Suckow's other attorney, "Prior entry"; that is correct as an entry, is it not?

A. Yes.

Q. Does that refresh your recollection that Mr. Townsend recommended that you should get a copy of this Borax Consolidated against Suckow?

A. Yes.

Q. Did you do so? A. I don't believe I did.

Q. Then the next item is, "Look up patent suit against Trona." Did you look up that patent suit?

A. Oh, yes. [278]

Q. Trona was the former name of the American Potash & Chemical Corporation, was it not?

A. Yes.

Q. And it was often referred to as Trona, even after the change of name? A. Yes.

Q. Is this the next entry there:

"Ask Consolidated vs. Suckow Mines Consolidated in Equity 310, Borax Consolidated vs. Ruth E. Suckow, page 12."

A. Yes.

(Testimony of George B. Burnham.)

Q. Those entries are there? A. Yes.

Q. And they were things Mr. Townsend thought you ought to look into? A. Yes.

Q. You went to Washington almost immediately after that interview, did you not, in August, 1934?

A. That is correct.

Q. And you brought with you a letter of introduction from Judge Heney to Mr. Louis Glavis, did you not? A. Yes.

Q. Who was Louis Glavis?

A. He was in the Department of the Interior in charge of investigations.

Q. He had gained considerable repute in connection with the [279] Ballinger controversy, did he not, as an investigator? He was well known?

A. I had heard that he had.

Q. Mr. Heney told you that he knew him well?

A. Yes.

Q. And that he would give you a letter of introduction to Mr. Glavis? A. Yes.

Q. And you were going back in connection with your suspicion that a monopoly was being obtained in the Kramer District by the Pacific Coast Borax Company, isn't that true?

A. Yes, in the Kramer District, but not necessarily a monopoly of the Borax business.

Q. Have you with you, Mr. Burnham, a copy of that letter of introduction? While I am looking for it you may have a copy.

Mr. Carr: Was it introduced?

Mr. Lasky: No. 28.

(Testimony of George B. Burnham.)

Mr. Harrison: Unfortunately these are not in order.

The Witness: Here is a copy.

Q. (By Mr. Harrison): Have you a copy?

A. Yes.

Q. We will use that at present and save a little time.

Mr. Carr: You will be referring to Defendants' 28?

Mr. Harrison: Yes, exactly. [280]

Q. Now, Judge Heney signed the original of which you handed me a copy of this letter of introduction?

Mr. Lasky: Here you are (handing a document to Mr. Harrison).

Q. (By Mr. Harrison): This is the office copy that Mr. Heney gave you, is it not? A. Yes.

Mr. Harrison: You can keep that for your file. I will offer this letter, one from Judge Heney to Mr. Burnham, and one from Judge Heney to Mr. Glavis.

(The documents in question were thereupon received in evidence and marked Defendants' Exhibit R.)

Mr. Harrison: Letter from Heney to Burnham is dated August 3, 1934, and the same date on the other letter, August 3, 1934.

Ladies and gentlemen of the jury, Defendants' Exhibit R consists, first of all, of a letter on the letterhead of the Chambers of the Superior Court, Los Angeles, California, Francis J. Heney, Judge,

(Testimony of George B. Burnham.)

dated August 3, 1944, to G. B. Burnham, 2823 Kelsey Street, Berkeley, California:

“Dear Burnham:

Enclosed find an original letter of introduction to Louis Glavis, together with a carbon copy thereof for your files.

With best wishes for your success in this matter, [281]

I am,

Very truly,

FRANCIS J. HENEY.”

And the other is a copy of a letter dated August 3, 1944, addressed to Louis Glavis, Bureau of Investigation, Interior Department, Washington, D.C.

“Dear Louis:

This will introduce my friend and former client, George B. Burnham, who desires to talk with you about a matter which I think it is well worth your while to investigate, to-wit, the matter of the Pacific Coast Borax Company having established, continued and maintained an evil and strangling monopoly in the borax business. It is a foreign-controlled corporation, and borax has become a material of such general use in the United States that a monopoly thereof is oppressive in many lines of business.

Mr. Burnham was an assistant professor of chemistry at Berkeley in the State University

(Testimony of George B. Burnham.)

of California before he got interested in the borax business. I think he is about as well posted as any man in the United States in regard to the borax business, and in relation to the question of the monopoly thereof by the Pacific Coast Borax Company.

With kind regards,

Yours very truly,

FRANCIS J. HENEY." [282]

Q. Now, then, you went East and called on Mr. Glavis, did you not? A. Yes.

Q. You told Mr. Glavis, did you not, that these defendants, the American Potash & Chemical Company and the Pacific Coast Borax Company, had cut the price of borax in the month of June, 1928, in the very month that your company had started production?

A. I never told him that in reciting the history of the Burnham Chemical Company. [282-a]

Q. I am not concerned with that; but you did in fact tell him that, did you not?

A. Yes, I believe I did.

Q. Did you also tell him that after you had sold your borax toward the end of 1929, about November of 1929, these same companies then increased the price of borax by one-third?

A. Yes.

Q. I would like to turn to your diary for October 11, 1934, with respect to an interview you had with Mr. Townsend.

(Testimony of George B. Burnham.)

Mr. Carr: What month was that?

Mr. Harrison: October 11, 1934.

Mr. Carr: Thank you.

Q. (By Mr. Harrison): Have you that, Mr. Burnham? A. Yes.

Q. Will you read it, please, the memorandum of your conversation with Mr. Townsend on that date?

A. At the top of the sheet it states, "October 11, 1934: Discussion with Townsend. Application for permits overlooks transactions concealed."

Q. If you will stop at that point, please, I will ask you what the notation, "Transactions concealed" means; in other words, what did Mr. Townsend tell you about transactions having been concealed?

A. The notes are very brief, but I think that Townsend was discussing the fact that the United States Borax Company had [283] concealed the fact that they had discovered sodium borate in their application for a patent to the land.

Q. Did he say in effect that they concealed in that application for a patent the fact that they had discovered sodium borate and yet they went ahead and prosecuted their application?

A. I think that was what Townsend had in mind.

Q. Did he not express the opinion that they had in their effort to get a patent to the land in the Kramer District, been guilty of concealing facts from the Government? A. Yes.

Q. Did he not say that it looked as though they

(Testimony of George B. Burnham.)

were not honest and aboveboard in their transactions with the Government? A. Yes.

Q. And you told him that you thought that the Burnham Chemical Company had not been open and aboveboard when they concealed from the Government the fact that they had sodium borate, did you not? A. Yes.

Q. And you believed that to be the fact?

A. Yes.

Q. And didn't it occur to you when you told Mr. Townsend that they had not been open and aboveboard with the Government that Zabriskie and Emlaw might not have been open and aboveboard in telling you about the price cuts in 1929?

A. That thought didn't occur to me, no. [284]

Q. Will you turn to your diary in 1936 for February?

Mr. Carr: What date?

Mr. Harrison: February: I don't think the witness has a date, but he has a note somewhere in February, is that correct, Mr. Burnham?

A. Yes.

Q. That you consulted a lawyer down in Los Angeles by the name of Hess. It is in the black book marked No. 14, Mr. Lasky tells me.

A. Yes, sir, I have it.

Q. What is your entry about consulting Mr. Hess? About what date is that, as near as you can fix it?

A. It is probably about February of 1936—some time in February.

(Testimony of George B. Burnham.)

Q. And Mr. Hess was a lawyer in Los Angeles?

A. Yes.

Q. All right, will you read the entry?

A. This concerns a conversation with Mr. Hess. It starts at the top of the page by saying: "Things to do with Washington. Confer with Edward H. Reede of Washington, D. C., on why have not made a success. Advise Hess address in Washington, D.C. 406 Rives-Strong Building. Check everything under L. A. 046240 in the Land Office patent issue to Dowsing."

Q. What was that?

A. "Patent issue to Dowsing"—D-o-w-s-i-n-g—"on April 9, [285] 1927. This info. for Hess. The north half of Section 24 etc. south quarter, northeast quarter, north half Section 24 etc. Kramer District. Correspondence urging speed in granting patent by some department deputy. Get the dates of transactions actual filing dates of applications. Also 045946 to U. S. Borax Co., southwest quarter, southwest quarter of northeast quarter. Little Placer highly vulnerable."

Q. "Vulnerable," is that?

A. Yes, "Vulnerable. See inside correspondence. If a deputy is a former employee of P.C.B. it would be valuable info."

Q. Now, that last statement, "If a deputy is a former employee of P.C.B. it would be valuable information," was a suggestion to the effect that if a deputy in the Government had been a former employee of the Pacific Coast Borax Company, that

(Testimony of George B. Burnham.)

would be a valuable bit of information to you, isn't that true?

A. That is what, apparently, Mr. Hess had in mind.

Q. And that referred to a deputy in the Land Office? A. Yes.

Q. And Mr. Hess told you, did he not, that he was rather suspicious that the granting of patents in the Little Placer to the United States Borax Company might be irregular or possibly fraudulent?

A. I don't know that he said that in those words, but that is probably what he meant.

Q. I will show you Page 353 of your deposition referring to that conversation—— [286]

Mr. Carr: Page 353?

Mr. Harrison: Page 353, Mr. Carr.

Mr. Carr: Thank you.

Q. (By Mr. Harrison): Page 353, Line 21, Mr. Burnham: Have you that? A. Line 21?

Q. Yes. I will read it to you and you can tell me whether or not you so testified:

“Q. Now, on that entry that if the deputy were a former employee of the Pacific Coast Borax Company, that would be information, do you refer to a deputy in the Land Office?

A. Yes.

Q. What kind of a deputy?

A. Well, Mr. Hess was rather suspicious that the granting of patents on the Little Placer to United States Borax Company, which we

(Testimony of George B. Burnham.)

all thought they were about to get, might be irregular and might be fraudulent.”

You so testified, did you not?

A. Yes.

Q. Have you the letter from Senator Pitman on September 14 that same year?

Mr. Carr: A letter from Senator Pitman?

Mr. Harrison: A letter from Senator Pitman to the Burnham [287] Chemical Company.

Mr. Carr: What date was that?

Mr. Harrison: September 14, 1936, and the reply under date of October 20, 1936.

Mr. Carr: You mean the reply of the Burnham Chemical Company?

Mr. Harrison: Yes.

Q. You kept those, Mr. Burnham; they were not turned in at the deposition? A. Yes.

Q. Will you give me those, please?

A. These are original carbon copies. They are the only ones we have.

Mr. Harrison: All right. We offer in evidence, first of all, the letter from Senator Pitman to the Burnham Chemical Company, dated September 14, 1936, as defendants' exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit S.)

Mr. Harrison: We also offer in evidence the reply to that letter addressed to Senator Pitman and signed “Burnham Chemical Company, By.....,

(Testimony of George B. Burnham.)

President." That reply was in fact signed by you, was it not, as President of the Company?

A. Yes. [288]

(The document in question was thereupon received in evidence and marked Defendants' Exhibit T.)

Mr. Harrison: Defendants' Exhibit S is a letter on the letterhead of the United States Senate Committee on Public Lands and Surveys, Washington, D. C., September 14, 1936, addressed to the Burnham Chemical Company, 6066 Rockridge Boulevard, Oakland, California, and reads as follows:

"Gentlemen:

As you may know, Senate Resolution 274, adopted June 18, 1936, (copy of which is enclosed), authorized and directed the Committee of Public Lands and Surveys of the United States Senate to institute and conduct a thorough investigation of all phases of the potash industry, hold hearings, and report at the next session of Congress the results of its investigations, together with its recommendations, if any, for necessary legislation.

For this purpose the powers of the whole Committee have been delegated to a Subcommittee with myself as Chairman and Senators Wagner, Ashurst, Hatch, and Carey as members.

Before commencing hearings it is desirable

(Testimony of George B. Burnham.)

to assemble as much information as possible from interested parties to show the actual status of the industry today and what, if anything, may be done to improve the present and [289] future status of the interested producers, distributors and consumers of potash in the United States, giving due consideration to the conservation of the mineral resources of the public domain and the related questions of imports and exports.

At your early convenience we would, therefore, like you to submit a statement containing such data as you feel should be required of you by the Subcommittee so that it may be fully advised in the matter of your past, present and contemplated interests in the potash industry. We would also appreciate constructive criticism of past or present conditions and recommendations for future action based on your experience with potash.

If we can secure the hearty cooperation of all concerned, we hope to evolve a report which will be of real value.

Kindly address your reply, as soon as convenient, to me at Washington.

Very truly yours,

/s/ KEY PITTMAN,

Chairman, Subcommittee on
Potash Investigation."

And Defendants' Exhibit T is a letter of October 20, 1936, addressed to the Honorable Key Pittman,

(Testimony of George B. Burnham.)

Senate Office Building, Washington, D. C. That is a long letter and I only [290] desire to read some extracts from it, and if you will take the letter, Mr. Burnham, I will read from my copy. On Page 2 the letter contains this statement:

“Foreign-owned corporations are practically the only producers of potash in America. They are also the principal producers of borax and are spoken of as the English Borax Trust. The world’s potash market is controlled by the German Potash Trust and apparently the English Borax Trust cooperates with the German Trust in the control of the market. As soon as any Government lease begins producing potash the Trust will no doubt cut the prices of potash and the lessees should have some kind of government protection against such competition. A similar situation occurred when we started producing borax. The very month we started on borax production, drastic cuts in the price of borax occurred”.

Then on Page 4 the last paragraph:

“Yet what happened? Just this, the Post Office Department of the United States Government, inspired by what we believe was misinformation based upon ignorance and probably influenced by our competitors, imposed a Post Office fraud order upon the company.”

(Testimony of George B. Burnham.)

Then on the next page, on Page 5, the first paragraph:

“The very month we started operations saw the beginning of a price war between the two largest producers of borax [291] (both English controlled corporations), which drove the selling prices down to the unbelievable price of \$18 per ton F.O.B. plant.”

Q. Those two largest producers are, of course, American Potash & Chemical Company and Pacific Coast Borax Company, are they not, Mr. Burnham?

A. Yes.

Mr. Harrison: (Reading):

“This was \$30 to \$40 lower than borax had ever sold before in its history. No producer could make profits at that price and a new company like ourselves without financial reserves could not continue indefinitely to carry the losses entailed in operation. It would almost appear that the cut in price of borax was purposely timed to start the very month we started borax production.”

That is all I think I care to read from that letter.

Mr. Carr: We will read the balance:

Mr. Harrison: Shall I proceed to another matter, if your Honor please?

The Court: Perhaps we might take the noon recess at this time.

Ladies and gentlemen of the Jury, we will resume

(Testimony of George B. Burnham.)

the trial at two o'clock. Please bear in mind the admonition of the Court heretofore given to you.

(Thereupon a recess was taken until two o'clock P.M.) [292]

Afternoon Session, April 1, 1947, 2:00 P.M.

GEORGE B. BURNHAM

recalled.

Cross-Examination
(Resumed)

By Mr. Harrison:

Q. Now, Mr. Burnham, this morning you were talking about your trip East in 1934. You started East in August, 1934, following your interview with Mr. Townsend on July 30, 1934, did you not?

A. Yes.

Q. When you went East did you bring with you a copy of the amended complaint in the fraud order suit?

A. I don't remember, but I might have.

Q. Did you bring with you a copy of your affidavit which was introduced in evidence this morning, and which you made in January, 1930, before the District Court? A. No.

Q. If you will turn to your deposition I will ask you if you testified as follows——

Mr. Carr: What page?

(Testimony of George B. Burnham.)

Mr. Harrison: Page 264, line 13.

“Q. When you went back East you showed that Mather letter to Glavis, did you not?

A. No.

Q. You took it East with you?

A. Yes. [293]

Q. What were the other documents you took East with you?

A. I don't remember. I took everything that I thought might be useful.

Q. You took a copy of the printed amended complaint in the Carson City suit, did you not?

A. Maybe. I presume I did.

Q. You took a copy of the affidavit you filed in the Carson City suit dated March 14, 1930?

A. Yes.”

You so testified, didn't you?

Mr. Carr: Let us follow on.

Mr. Harrison: Yes, Mr. Carr, just a minute.

“Mr. Lasky: This was later.

A. I probably did. I don't remember what I took.

Q. I suppose you took with you copies of the ‘Oil, Paint & Drug Reporter’ showing the price cuts of June, 1928?

A. I don't remember taking that.”

Did you so testify?

A. Yes.

(Testimony of George B. Burnham.)

Q. On your present recollection would you say that you probably did take that affidavit?

A. That affidavit was a typewritten document filed in Carson City, and I doubt very much that I took that. I took the amended complaint, because that was printed and there were lots of copies, but special copies that were typewritten and [294] perhaps only one or two available anywhere, I doubt if I took that.

Q. So that whereas in your deposition you thought you probably took it, now you think you probably did not?

A. After giving it more thought I rather think I did.

Mr. Carr: He says, "I don't remember what I took."

Mr. Harrison: He said he probably did. The deposition speaks for itself. I have read it fully. I am trying to get the witness' varying recollection from time to time.

Mr. Carr: Read all of his answer, Mr. Harrison.

Mr. Harrison: I have, Mr. Carr. If you want to read anything I have not read, I will be glad to have you do it.

Q. Now, Mr. Witness, when you were back there I think you testified this morning that you told Mr. Glavis about the price cuts in 1928, did you not?

A. Yes.

Q. And you told him about the fact that they had occurred at the time you began production, did you not?

(Testimony of George B. Burnham.)

A. Well, I related to Mr. Glavis the history of the Burnham Chemical Company, and I probably related those things in relating the history. I don't specifically remember taking those particular points to him.

Q. What is your best recollection at the present time as to whether or not did you tell him that the price cuts had occurred at the time you began production? [295]

A. In any ordinary accounting the Burnham Chemical Company, the history of the Burnham Chemical Company, I told him the price cut occurred the month we started production; but to put my finger on definitely, I do not remember after all of these years.

Q. In other words, you have no recollection now as to whether you told him or not? I just want to get your present recollection. What is your best recollection: Did you or did you not tell him about the price cuts?

A. Well, I told him the history of the company, and so I must have told him about the price cuts.

Q. Your best recollection is that you did tell him?

A. To the best of my recollection, yes.

Q. And you attached significance, did you not, to the fact that those price cuts occurred?

A. Yes.

Q. At that time? . A. Yes.

Q. Will you show me your diary entry about

(Testimony of George B. Burnham.)

a conversation with Mr. Townsend on October 11, 1934? A. Yes, I have it here.

Q. Will you read that, please, about the Goldfields? A. October 11, 1934?

Q. Yes, sir.

A. Oh, yes. Shall I read the whole article? [296]

Q. I am only interested in that part dealing with the Goldfields control. Let me ask you, first of all, that is a memorandum of a conference with Mr. Townsend on October 11, 1934, is it not?

A. Yes.

Q. Refreshing your recollection by that memorandum, what did Mr. Townsend tell you about the control of the Borax Consolidated, Ltd., by Goldfields?

A. "Plaintiff's Goldfields Consolidated of South Africa may control the Borax Consolidated. Believe maybe there is a report on it."

Q. Now, Goldfields, Consolidated, as you knew, were in control of the American Potash & Chemical Company, were they not?

A. That is what I understood at that time.

Q. Mr. Townsend told you at that time that they might also control the Borax Consolidated, Ltd.?

A. That maybe they might, yes.

Q. And the Borax Consolidated, Ltd., in turn controlled, as you knew the Pacific Coast Borax Company? A. Yes.

Q. While you were in the East, in the fall of 1934, or about that time, you wrote some letters to the Secretary of the Interior, did you not?

A. Yes.

(Testimony of George B. Burnham.)

Q. Will you produce, please, the letter of September, 1934, to [297] the Secretary of the Interior, that is, September 21, 1934?

A. Yes, I have a copy here.

Q. Will you let me have it, please?

A. I guess this is a letter more clear.

Q. Do you have another copy in your hand?

A. Yes, I have another copy.

Mr. Harrison: We offer this in evidence, if your Honor please, a letter of Burnham Chemical Company to the Honorable Harold R. Ickes, dated September 21, 1934.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit U.)

Mr. Harrison: And from my copy I will read to the jury, Mr. Burnham, and you can follow at the bottom of page 1.

This is addressed to the Honorable Harold R. Ickes, Secretary of the Interior, Washington, D. C., and is dated September 21, 1934, on the letterhead of Burnham Chemical Company:

"In the summer of 1928 this company, after overcoming many difficulties, succeeded in completing its borax plant upon its lease property and produced and sold 1427 tons of refined borax. No sooner had we started production than a most drastic cut in price of borax occurred. Prior to our production borax sold for

(Testimony of George B. Burnham.)

about \$50 per ton f.o.b. Searles Lake, California. Immediately upon starting production in June, 1938, the price was cut to about \$30 per ton f.o.b. Searles Lake. This was the lowest price in the history of the borax business. Soon thereafter it was cut even more, until finally the price was reduced to \$18 per ton. Our cost of production was \$26 per ton, and therefore it was impossible for us to continue to operate and produce borax. The prevailing price of borax has remained at approximately this same low figure of \$18 per ton f.o.b. plant.

The reason our competitor has been able to maintain this low price is because of his illegal acquisition in 1926 of the most valuable and most economical source of sodium borate in the world. This is a new source of borax and is known as the Kramer Borax Deposit."

The competitor referred to in the last paragraph, of course, is Pacific Coast Borax Company, is it not?

A. Yes.

Q. Reading further from page 5 of the letter, the second paragraph:

"Therefore, by illegally acquiring a source of cheap borax supply our competitor, the Pacific Coast Borax Company, have made it impossible for us to produce borax at a profit at present prices.

It is not fair nor just that the Government should now take steps to cancel our lease upon

(Testimony of George B. Burnham.)

Searles Lake due to the non-payment of our rent, or the non-production of the minerals thereon when the cause of such default [299] is due to the false and deceitful action of our competitor, whose main object is to get patent to sodium borate lands and to drive out all competition and hold a monopoly of the borax business. Nor is it fair that the Government continue to the end that the borax trust can obtain continued ownership and thereby drive out of business a Government lessee, such as ourselves, who must pay a royalty on production and who obtains its lands and mineral deposits by legal and lawful methods.”

That letter was signed by you, was it not?

A. Yes.

Q. Have you the letter of November 28, 1934?

Mr. Carr: To the Secretary of the Interior?

Mr. Harrison: Yes, Mr. Carr, that is right. Before I leave that other letter there is one further passage:

“For six years we have been defending the interests of the people of the United States against the illegal practices of the borax trust. We had to carry on our battle with meager funds, whereas, the borax trust had unlimited money at its disposal. After the six years of struggle in our fight for the people’s interest, is it fair to cancel our Searles Lake lease because we have no money left to pay the rent?”

(Testimony of George B. Burnham.)

Q. Do you have that letter of November 28th?

A. I do not seem to have a copy here. [300]

Mr. Harrison: Have you a copy, Mr. Carr? I have a certified copy from the Department of the Interior. It is bound up with a lot of other things. May I take this apart?

Mr. Carr: I have one of November 18th.

Mr. Harrison: November 28th.

Mr. Carr: I haven't got that.

Mr. Harrison: I have here a certified file, certified under the seal of the Secretary of the Interior. May I remove this?

Mr. Carr: Oh, yes, surely.

Mr. Harrison: We offer in evidence, if the Court please, this certified copy.

Mr. Carr: Have you any copies, Mr. Burnham, of that letter?

Mr. Burnham: No, I do not seem to have that with me.

Q. (By Mr. Harrison): I will show you this letter, Mr. Burnham, certified to by the Department of the Interior, and ask you whether that is a photo-static copy of a letter with your signature.

A. Yes, sir, it is my signature.

Q. That was mailed about its date to the Department of the Interior, was it not? A. Yes.

Mr. Harrison: We offer this letter in evidence, if the Court please. [301]

Mr. Carr: May I take a look at that first?

Mr. Harrison: Yes, surely.

(Testimony of George B. Burnham.)

(The document in question was thereupon received in evidence and marked Defendants' Exhibit V.)

Mr. HARRISON: From this letter we read to the jury the following passages. I am reading from a copy that Mr. Carr looked at:

"Immediately upon our entering into the production of borax the price of borax fell from \$50 to \$18 per ton f.o.b. Searles Lake, \$18 per ton below our cost of production, which is \$26 per ton in our present size of plant, so we had to shut down.

There are only three principal producers of borax in the world today, namely, the Pacific Coast Borax Company and the American Potash & Chemical Company, both controlled by English capital and known as the Borax Trust. In fact, they may be classed as one producer, since they both operate under English control. The West End Chemical Company at Searles Lake is the third producer. There are no other borax producers, because they have now all been bought out by the Trust."

Q. As a matter of fact, you referred this morning to the fact that you learned in 1934 that the Pacific Coast Borax had acquired the property of the Western Borax Company, did you not, Mr. Burnham? [302] A. Yes.

Q. And that they had also secured control over Dr. Zuckow's mine? A. Yes.

(Testimony of George B. Burnham.)

Q. And you knew at that time that the Pacific Coast Borax had been engaged in litigation with Suckow? A. Yes.

Q. You had discussed that litigation with Dr. Suckow, had you not? A. Some, yes.

Q. Didn't he tell you that his claim was that Pacific Coast Borax Company had forced his company into bankruptcy and thereby intending to eliminate him from competition?

A. Well, I don't know as he said all that, but he said he was in litigation in the bankruptcy proceedings, or something of that sort.

Q. Didn't he say in his opinion the Pacific Coast Borax Company was responsible for his troubles?

A. I don't remember that he said that.

Q. You did hear that at that time, did you not, or about that time?

A. Well, Townsend might have told me.

Q. Townsend told you on July——

Mr. Carr: He said he might have.

Q. (By Mr. Harrison): Yes, now I am asking you isn't it a [303] fact that Townsend told you on July 30, 1934, that there was this litigation in connection with the discussion of the monopoly of the Pacific Coast Borax Company?

A. Well, Townsend told me that the Suckow Borax Mining Company was involved in litigation with the Pacific Coast Borax Company, I believe.

Q. Didn't he advise you to look into that litigation for the purpose of obtaining evidence of their monopolistic control?

(Testimony of George B. Burnham.)

A. Well, he suggested that I get a copy of the complaint, but I did not have time to get it.

Q. Let us get down to the year 1937. You had some testimony on direct examination about a conversation in the year 1937 with Mr. Emlaw, did you not? A. Yes.

Q. I call your attention to the fact that in the original transcript of the deposition the question was asked you—and I am referring now to page 44 of your deposition; will you look at that?

A. Page 44? [304]

Q. That is the second line. Counsel had been examining you, I may say, Mr. Burnham, about the conversation of May 17, 1929, with Mr. Emlaw, and I am asking you now whether this isn't the fact that on your original deposition you were asked:

“Q. Did you ever talk to Mr. Emlaw again?

A. I don't remember. I know that I called at the office of American Potash & Chemical Company, but I don't remember of talking to Mr. Emlaw.”

And that when you re-read your deposition for the purpose of correcting it, you struck out the words “I don't remember” and made the answer read as follows:

“A. I know that I called at the office of American Potash & Chemical Company and I talked to Mr. Emlaw again on October 19, 1937.”

(Testimony of George B. Burnham.)

And you assigned as your reason for the change that when the question was first asked you didn't remember that particular conversation. That is the fact, is it not?

A. For the moment it had slipped my mind.

Q. So when you were first asked on your deposition whether or not you had talked to Mr. Emlaw you did not remember your conversation in 1937. That is a fair statement, isn't it?

A. Yes, momentarily I forgot that other visit.

Q. Now, let's come down to the year 1938: by the way, before we do, will you turn to your entry of October 3, 1937? [305]

Mr. Carr: Diary?

Mr. Harrison: Diary, yes, the entry of your meditations on October 3, 1937?

A. October 3, 1937? I have it here.

Q. Yes, and there is a memorandum of some meditations of yours, is there not? A. Yes.

Q. Will you read them?

A. "Would relinquish my stock if necessary. Everything that is done in the Land Office in the way of potash or borax is nearly always for the benefit of the Borax Trust."

Q. In making that memorandum at that time——

A. (Continuing): "always for the purpose of making the rich richer. I want to see the poor people or the people of small means get richer."

Q. Yes, that is the complete entry?

A. Yes.

(Testimony of George B. Burnham.)

Q. Now, in referring to the Borax Trust at that time and when you wrote that memorandum you were referring to these defendants, were you not?

Mr. Carr: Which defendants?

Mr. Harrison: The American Potash & Chemical Company and the Pacific Coast Borax Company, and the allied companies.

The Witness: Yes.

Q. Now, in September of 1937, the Post Office revived its [306] enforcement of the fraud order, did it not? A. Yes.

Q. And that circumstance aroused your suspicions again, did it not, with respect to whether or not your competitors were responsible for the Post Office action ?

A. Yes, I was beginning to wonder again if that might not be so, if they might not be behind that.

Q. Now, then, in 1938, isn't it true that you consulted an attorney about any possible claim you might have against the Pacific Coast Borax and the allied companies and the American Potash & Chemical Company with respect to the damage done you as the result of the price cuts in 1928?

A. Yes.

Q. In 1938, in the early part of 1938, isn't it true that three things occurred which revived your belief as to the responsibility of these companies for the price cut and the damage to you: in the first place, this fraud order had been reinstated the previous September, had it not? A. Yes.

(Testimony of George B. Burnham.)

Q. In the second place, your lease had been terminated by the Department of the Interior, had it not? A. Yes.

Q. In the third place, an appeal which you had made to the President of the United States had been denied, had it not, by the beginning of 1938?

A. Yes.

Q. And isn't it a fact that those three circumstances rearoused your suspicions? A. Yes.

Q. Now, then, will you turn to a diary entry of February 4, 1938, stating your meditations?

A. I have them here. Shall I read them?

Q. Yes, please.

A. "Item 1." That starts at the top of the page: "February 4, 1938. Basic steps of progress for B.C. Co."

Q. That is Burnham Chemical Company?

A. Burnham Chemical Company, yes. "1. Write or see E. C. Finney to find out who caused the P.O. fraud order renewal."

Q. And that referred to the fact that the Post Office had revived the enforcement of the fraud order, did it not? A. Yes.

Q. Go right ahead.

A. "Item 2: Have Robert Collier of New York write up a series of extant letters for getting contributions for fight for justice and to be mailed to all B.C. Co. stockholders

"Item 3: Hunt for a noted writer who is opposed to trusts to write up a story of B. C. Co."

(Testimony of George B. Burnham.)

Q. That is Burnham Chemical Company?

A. Yes.

Q. That is, "for a noted writer who was opposed to trusts to write up a story on Burnham Chemical Company"? [308]

A. Yes.

Q. Go right head.

A. "Item 4: Employ William Stephens to investigate to see if we have a case against the P.C.B."

Q. Who had suggested the name of William Stephens to you as an attorney?

A. A stockholder in New York.

Q. And some stockholder in New York before February 4, 1938, had suggested you employ Mr. Stephens in connection with a possible suit against these defendants American Potash & Chemical Company and Pacific Coast Borax, is that correct?

A. That's right.

Q. What was the purpose of hiring a writer opposed to trusts to write a history of the Burnham Chemical Company?

A. Well, I thought it might do some good for us, but I abandoned the idea.

Q. But when you wrote these meditations you thought if somebody opposed to trusts would write a story on the Burnham Chemical Company, that would be helpful?

A. Yes.

Q. Now, then, you did consult Mr. Stephens in New York on May 10, 1938, did you not?

A. May 10, 1938, yes.

Q. That is correct?

A. Yes. [309]

(Testimony of George B. Burnham.)

Q. By the way, have you an entry on May 4, 1938, with respect to a call on Senator Pittman?

Mr. Carr: What date?

Mr. Harrison: May 4, 1938.

The Witness: Yes, I believe I have.

Q. May I see it, please?

A. I believe I have. I will look and see. Yes, there is a copy here.

Q. And on that date you called on Senator Pittman? A. Yes.

Q. Which part of the page, please?

A. Right down there (indicating).

Q. Will you read that entry, please — the two lines, I suppose, are all that refer to it.

A. It says, "Saw Pittman.". That was Senator Pittman. "On May 4, 1938. Committee done nothing yet. Expect to hold a meeting this summer and may call upon me. Will report to Congress at the next session." That is all.

Q. Now, the committee you were discussing with Senator Pittman on May 4, 1938, was the committee, I assume, about which you were written in 1936 in the correspondence introduced in evidence this morning? A. Yes.

Q. That is to say, the committee which was appointed to investigate the potash situation? [310]

A. Yes, both the potash and borax.

Q. And borax, too? A. Yes.

Q. And then six days later, on May 10, 1938, you consulted Mr. Stephens in New York?

A. That's right.

(Testimony of George B. Burnham.)

Q. He is an attorney at law? A. Yes.

Q. You unburdened your troubles to him, is that right? A. Yes.

Q. And among those troubles were the price cuts of 1928? A. Yes.

Q. Will you read me the diary entry with respect to your consultation with Mr. William Stephens?

A. At the top of the page it is dated May 10, 1938, and reads, "Result of conference with William Stephens attorney: newspaper articles — magazine articles—agitation against P. C. B.".

Q. That means Pacific Coast Borax, does it not?

A. Yes, "or A. P. & C. Co."

Q. That means American Potash & Chemical Company, does it not? A. Yes.

Q. Go right ahead.

A. "Or Department of Interior does not render any direct benefit to B. C. Co. stockholders."

Q. Burnham Chemical Company stockholders?

A. Yes, Burnham Chemical Company stockholders, that's right.

"It is too much on the order of revenge unless Potash Investigating Committee can be influenced to pass favorable legislation."

Q. Did that represent advice that Mr. Stephens gave you on that occasion? A. Yes.

Q. All right, now, go ahead.

A. "Doubt that we have a chance with the Federal Trade Commission as price cut period is now outlawed."

(Testimony of George B. Burnham.)

Q. Does that represent advice he gave you on that occasion? In other words, he told you he doubted you had a chance with the Federal Trade Commission as the price cut period was now outlawed? A. Yes, that is what he meant.

Q. And by the price cut period he meant the period in June, 1928? A. Yes.

Q. In June, 1928, when you began your production, isn't that true? A. That's right.

Q. All right, now, will you go ahead?

A. "Statute of limitations for six years—price cut started in 1928. However, if evidence of collusion between P. C. B.—"

Q. That is Pacific Coast Borax?

A. Yes, "and A. P. & C. Co. is found, then that new evidence would be grounds for starting an anti-trust suit to recover damages for B. C. Co. Must find new evidence. Best bet is to concentrate on patent infringement by finding new evidence of infringement of process by A. P. & C. Co."

Q. That "A. P. & C. Co." in both cases means, of course, American Potash & Chemical Company?

A. Yes, American Potash & Chemical Company.

Q. At the time you consulted Mr. Stephens in May of 1938 you were again becoming suspicious with respect to the fact that these companies had cut their prices in June, 1928, in the very month you had started production, were you not?

A. Yes.

Q. That is to say, you were suspicious they had

(Testimony of George B. Burnham.)

done it for the purpose of injuring you, isn't that true? A. Yes.

Q. Now, you told Mr. Stephens the general history of the Burnham Chemical Company and you told him that the price cut had occurred in June, 1928, at the very time you started production, did you not? A. Yes.

Q. And didn't he say, "That is a remarkable coincidence that [313] the price should have dropped the very month you started producing and it might indicate some violation of the law"?

A. Yes.

Q. Did he say that even if it did indicate a violation of the law more than six years had gone by and he thought probably the statute of limitations would prevent you from doing anything?

A. Yes.

Q. Did you call his attention to the fact that the price cut occurred by the two companies simultaneously and during the very month when you first started production, or about the same time?

A. During the month, but I don't know that I used the word "simultaneously".

Q. But you said at about the same time?

A. Yes, I said at about the same time.

Q. And in the month you started production?

A. Yes, during the month.

Q. And he was quite impressed with that point, was he not? A. Yes.

Q. Then you returned to San Francisco, did

(Testimony of George B. Burnham.)

you, after that interview with Mr. Stephens—return west, let us say?

A. Let me see, 1938? Well, I got back to San Francisco. I suppose I did. I would have to check up my notebooks to know for sure. [314]

Q. Now, you started—excuse me, did I interrupt you?

A. I think I went on right back to San Francisco, yes.

Q. You started back east in August of 1939, did you not? A. Yes.

Q. And when you started back east in August of 1939, you brought with you a copy of the Mather letter to which we have referred, did you not?

A. Yes.

Q. And you brought with you a copy of Mr. Townsend's letter to Mr. Hinrichs in July of 1928, did you not?

A. Yes, I think I had that too with me.

Q. And you brought with you this draft of an account of monopoly which Mr. Muir prepared?

A. I evidently had that with me.

Q. So you must have brought that with you in August of 1939? A. Yes.

Q. How long have you had that paper by Mr. Muir?

A. I think Muir wrote that in about May of 1938 and had not finished it. It was not complete.

Q. It was a preliminary draft? A. Yes.

Q. He had given it to you about May of 1938?

A. Somewhere around there.

(Testimony of George B. Burnham.)

Q. And you had had it from that time until you started east in August of 1939? [315]

A. That's right.

Q. Mr. Muir was a stockholder of your company, was he not? A. Yes, yes.

Q. Now, when you went east in August of 1939, you expected to confer with Mr. Stephens, did you not, the attorney with whom you had consulted during the previous year in New York?

A. Yes, I think I was going to see Mr. Stephens again.

Q. And while you were east on that trip you called on Mr. Berge of the Antitrust Division of the Department of Justice, did you not?

A. This was the trip in the fall of 1939?

Q. 1939? A. Yes.

Q. In November, 1939, you called on Mr. Wendell Berge? A. Yes.

Q. And Mr. Wendell Berge was one of the members of the Department of Justice, in the Antitrust Division, was he not? A. Yes.

Q. And Mr. Berge suggested that you write a letter to his superior, Mr. Thurman Arnold, did he not? A. Yes.

Q. And Mr. Thurman Arnold was Assistant Attorney-General in charge of the Antitrust prosecutions at that time, was he not?

A. Yes.

Q. While you were east on that occasion you wrote a letter to the Secretary of the Interior, did

(Testimony of George B. Burnham.)

you not, on November 18, 1939, which has been introduced in evidence here? A. Yes.

Mr. Carr: What number is that? -

Mr. Harrison: No. 14.

You can follow me, Mr. Burnham, with that copy. I have read parts of this letter to the Jury already, the parts particularly relating to Mr. Mather and his letter. I now read other parts of the letter. This is a letter of November 18, 193, to the Secretary of the Interior, Washington, D. C. The second paragraph on the first page states:

“As President and Stockholder of the Burnham Chemical Company and as a citizen of the United States I protest the granting of any further potash lands, through lease or otherwise, to the American Potash & Chemical Company; and I make this protest on behalf of seven thousand American citizens who are stockholders of the Burnham Chemical Company. The reasons for my protest are as follows:

“(1). The American Potash & Chemical Corporation and other fertilizer producers are now being investigated by the Antitrust Division of the Department of Justice for alleged violation of the Sherman Antitrust Laws. This corporation is a foreign-owned Company with about [317] 80 per cent of its stock held by foreign citizens residing in England. The corporation, together with another British-owned

(Testimony of George B. Burnham.)

potash and borax producer in the United States constitute a formidable monopoly of the potash and borax industry of this country.”

Q. Now, the other British-owned potash and borax producer was the Pacific Coast Borax Company and allied companies, was it not?

A. Yes, sir.

Q. On Page 3, Paragraph 3, it is stated:

“The Burnham Chemical Company was granted a lease on lands at Searles Lake. The company is composed of 7,000 American citizens. It proceeded with the development of its lease by raising money through the mails. The literature it sent through the mail was based on facts, and was truthful, and yet the Post Office issued a fraud order against the Company, in 1925, denying it the use of the mails. Our supply of funds, the lifeblood of the Company, was cut off. The Company defended itself in the U. S. District Court, in Carson City, Nevada, and asked for a temporary injunction against the Post Office fraud order. The Court handed down a decision in favor of the Burnham Chemical Company, as it saw no evidence of fraud. It granted the Burnham Chemical Company a temporary injunction. This Post Office fraud order, of course, [318] made it extremely difficult for the Burnham Chemical Company to raise any funds thereafter. However, the Company did manage to

(Testimony of George B. Burnham.)

raise sufficient money to build part of its plant and produce borax; and 1,400 tons of 99½ per cent pure borax was produced. But, the very month our production started, in June, 1928, the American Potash & Chemical Corporation and the Pacific Coast Borax Company, both foreign-owned companies, began cutting the price of borax from approximately \$60 per ton f.o.b. Searles Lake to about \$18 a ton. Our cost of production was \$26 per ton, so, when the price fell below \$26 we were losing money—and we had to close down our plant. After we stopped our small production the price went up. This further discouragement of the efforts of American citizens to develop the country's natural resources was such that we were unable to pay even the rent on the lease, and, therefore, the Department of the Interior cancelled our potash lease."

Now, the next paragraph:

"It is a very significant fact that we produced 1,400 tons of 99½% pure borax by solar evaporation methods, and without the use of any fuel oil whatsoever. It is even more significant when it is realized that this was a small capacity plant which made this production and that only one product was made instead of several products. [319] If capital had been available so that other products could have been made at the same time, the

(Testimony of George B. Burnham.)

cost per ton of borax would have been much less because part of the cost of production would have been distributed over the various chemicals that were produced. Yet, if the Company had not been denied the use of the mails, ample capital would have been available. It is evident that the foreign-owned borax interests realized that if the solar methods of production got an adequate start they could become serious competitors to themselves; it would break the British Monopoly of the potash and borax industry in this country; and so this drastic cut in the price of borax was aimed at us, to drive the cheaper methods of production from the field. The new source of borax in the Kramer Borax fields was the excuse of the Borax Trust for cutting the price of borax, but that field had been in production for a year before we started production. Furthermore, after we stopped our small production, the price went up. Our being driven from the field of production was a detriment to the country as a whole, as well as to the 7,000 American citizens which our company is composed of, who were developing these valuable resources. Foreign interests drove us out."

Q. Now, you knew, of course, that the Kramer Borax fields had been in production the year before you started production at [320] the time in

(Testimony of George B. Burnham.)

1928, when you did start production—if my question is clear, isn't that right, Mr. Burnham?

A. Yes.

Q. I have already read the next passage in which I am interested with regard to Stephen T. Mather and I will not repeat that.

On Page 7:

“At the time the Carlsbad Potash Leases were issued in New Mexico, I understand foreign interests secured control of six of the seven leases—although it was against the public interest to permit foreign interests to control so much of the Government New Mexico Potash Reserve. I believe there was some protest about it at the time. However, a new company was formed to develop the leases, called the United States Potash Co., and this company is a subsidiary of the Pacific Coast Borax Co. and therefore is still a foreign-controlled company. Soon after the leases were granted and the new company was formed, Mr. Horace M. Albright, Director of the National Parks Service in the Department of the Interior, was made Vice-President and General Manager of the United States Potash Company. Mr. Albright resigned from his position in the Department of the Interior on August 10, 1933, and immediately became Vice-President and General Manager of the United States Potash Company—a foreign-

(Testimony of George B. Burnham.)

owned [321] company. (See Who's Who in America, 1938).

This incident shows a further connection between foreign-owned interests and Government officials which lead us to believe the foreign-owned interests have more than once used their influence in the Halls of Government to drive out American competition and that they have obtained more and more of the borax and potash of this country, to the detriment of American citizens."

I think that is all I care to call the Jury's attention to at this time in that letter.

Now, with respect to the letter of Mr. Arnold of November 22, 1939—that was Defendants' Exhibit A, Mr. Burnham. That letter I have already read to the Jury and I won't take the time to re-read it now except for purposes of refreshing your recollection. You said a few moments ago, Mr. Burnham, that you wrote this letter to Mr. Thurman W. Arnold dated November 22, 1939, at the suggestion of Mr. Berge? A. Yes.

Q. And the letter is addressed to Mr. Arnold, Attention Mr. Berge? A. Yes.

Q. It is a fact, is it not, that that letter states substantially what you had told Mr. Berge in the interviews you had with him a few days before?

A. Yes. [322]

Q. Substantially? A. Yes.

Q. And those things you told Mr. Berge in

(Testimony of George B. Burnham.)

that November, 1939, interview, you had told Senator Pittman in 1937 or 1938, had you not?

A. No—wait a minute, now. Things had been developed in 1939 and I told Pittman a great many of the things that I told Wendell Berge, but I told Wendell Berge more, because much more time went by.

Q. Then, I will ask you to turn to Page 469 of your deposition, please:

“Q. Had you ever told anybody else before your talk with Mr. Berge the things you told him?”

A. I talked to Senator Key Pittman on some of these things——”

Mr. Carr: What page?

Mr. Harrison: Page 469, Lines 3 and following:

“Q. Had you ever told anybody else before your talk with Mr. Berge the things you told him?”

A. Well, I talked with Senator Key Pittman on some of these things because the Senate had passed a resolution to make an investigation as to the activities of our competitors and Senator Pittman asked me for what information I had on the subject.

Q. When was that conversation with Senator Pittman? [323]

A. It seems to me it was in 1936.

Q. I see.

(Testimony of George B. Burnham.)

A. And also in 1937. Well, I had several conversations with Senator Pittsman."

Then, down on Line 23:

"Q. So you told Senator Pittman about that time the same things you had told Mr. Berge?

A. Yes, at that time, or a little earlier.

Q. That is to say——

A. A little earlier, I believe.

Q. That was about 1936 or 1937?

A. 1937."

Did you so testify, Mr. Burnham?

A. Yes, keeping in mind the other intervals that I couldn't tell Pittman. The things that happened in 1939 when I was talking to Pittman in 1937 and '38, naturally I couldn't tell him those things.

Q. I call your attention to the fact that you have already stated that your letter to Mr. Arnold contains a statement of what you told Mr. Berge. That is correct, is it not?

A. Say that again.

Q. The letter of Mr. Arnold, of November 22, 1939, is a statement of substantially what you told Mr. Berge a few days before? A. Yes.

Q. What you told Mr. Berge a few days before was what you had already told Senator Pittman, except as to things that occurred after you talked with Senator Pittman in 1937, or thereabouts, isn't that true? A. Substantially, yes.

(Testimony of George B. Burnham.)

Mr. Harrison: In order that the witness——

The Witness: I don't remember exactly the things, but substantially.

Mr. Harrison: In order that the witness' testimony may be clear, I would like to read certain passages from this letter.

Mr. Carr: What letter are you talking about?

Mr. Harrison: Defendants' Exhibit A to Arnold.

“Referring to a conversation which I had with Mr. Berge the other day, I understand that the Antitrust Division of the Department of Justice is investigating the alleged violation of the Sherman Antitrust Laws by the fertilizer industries.”

Q. That, of course, occurred in 1939?

A. I didn't know about it until November.

Mr. Harrison: “Potash is one of the principal fertilizer ingredients used by agriculturists and much of the potash produced in this country comes from Searles Lake, in California.”

Q. That, of course, had been true always, had it not? [325]

A. Yes.

Mr. Harrison: “The value of the borax and other boron chemicals produced from Searles Lake is about equal to the value of the potash. Both chemicals are recovered from the brine during its process of treatment. Therefore, the selling price of potash is dependent somewhat on the selling price of borax. The American Potash & Chemical Com-

(Testimony of George B. Burnham.)

pany is producing all the potash now made at Searles Lake, California. The only other source of potash in the United States besides Searles Lake is the Carlsbad Potash field in New Mexico. The principal producer there is the United States Potash Company, and it is controlled by the Pacific Coast Borax Company, who produce borax at Kramer, California. Therefore, this borax producer also has an influence over the price of potash.”

Q. That you had known for sometime, of course, that condition? A. Yes.

Mr. Harrison: “The American Potash & Chemical Corporation and the Pacific Coast Borax Company are both English-owned companies, and the two together constitute the British Borax Trust. Hence the price of potash in America is practically under the control of the British Borax Trust.

“The Burnham Chemical Company at one time had a Government lease at Searles Lake, and was planning to make potash, borax and other chemicals from that deposit. [326] We completed a plant in 1928 for the production of borax, and we expected, through the profits we made in borax, to add a potash plant and also make other chemicals and gradually grow to become a large producer. Borax was selling for over \$60 a ton f.o.b. Searles Lake, and the Burnham Chemical Company estimated it could produce borax for \$25 a ton in a small plant with its patented solar^s processes; and so make sufficient profit to enable it to grow and make potash and other chemicals.

(Testimony of George B. Burnham.)

Q. And the preliminary draft of the article en-

“However, the very month the Burnham Chemical Company started production of borax, in June, 1928, a drastic cut in the price of borax occurred, with the result that, in a few months, we were forced out of business. From outward appearances it appeared that the price war on borax was between the two big English producers, namely, the American Potash & Chemical Corporation and the Pacific Coast Borax Company. The fact that the main price cutting in the price war started the month we began production convinces us that it was aimed purposely to destroy us. At least, that was the resulting effect of the price war.

“We took the matter up with our attorneys, Francis J. Heney and B. D. Townsend, to see if we did not have a case against the Trust for violating the Sherman Antitrust Laws. These attorneys, who are now both deceased, felt that we had a case, but we were so completely ruined [327] as a result of the price war, and also in debt, that we were financially unable to employ the attorneys to go ahead with the matter.

“As time goes on, more evidence has been gathered to show that the two British-owned borax and potash producers in the country are building up a monopoly to drive out all American competition. And so, since you are making an investigation of the fertilizer industries, I am bringing our situation to your attention at this time.

“Enclosed you will find a copy of a letter writ-

(Testimony of George B. Burnham.)

tern by Mr. B. D. Townsend to H. S. Hinrichs, dated July 26, 1928, in which Mr. Townsend points out certain features of the unfair methods of competition being used by the British Borax Trust.

“There is also enclosed the preliminary draft of an article entitled, ‘Foreign-owned monopoly vs. People of the United States.’ It is really a history of the Burnham Chemical Company. This article is not completed and should be treated confidentially until such time as the author desires to put it in finished form.

“I am also enclosing a letter dated November 18, 1939, which I have just written to the Secretary of the Interior, asking that we be granted a new lease on Searles Lake, and suggesting Government financial aid to develop the lease. There may be something in all the enclosed data [328] which will be helpful to you.

“If there is anything further that I can do to assist you in your investigation, I shall be very happy to do so.

Yours very truly,

G. D. BURNHAM.”

Q. (By Mr. Harrison): Now, the letter to Hinrichs, which was mentioned in this letter, and a copy of which you sent to Mr. Arnold on that day, has been introduced in evidence in this case, has it not? That is the letter that was enclosed in the letter to Mr. Arnold? A. Yes, I believe it is.

Q. And the preliminary draft of the article and entitled, “Foreign-owned Monopoly vs. The People

(Testimony of George B. Burnham.)

of the United States," which you sent to Mr. Arnold with this letter, was the article by Mr. Muir which we have been discussing earlier this afternoon? A. Yes.

Q. You have a copy of that here in court, have you not, the Muir article? A. Yes.

Q. Now, then, after having written Mr. Arnold on November 22, 1939, you wrote Mr. Pierce on December 18, 1939, did you not?

A. In answer to his letter to me, yes.

Mr. Carr: What date is that?

Mr. Harrison: December 18, 1939.

The Witness: Do you have a copy there? [329]

Mr. Harrison: I am trying to find it, Mr. Burnham. Yes, I have it. I have a copy that I think you gave me. It may be in the deposition file here, a letter from Mr. Pierce dated December 8, 1939.

Q. Have you that?

A. Yes, I have the original.

Q. You have the original?

A. I just now found it.

Mr. Harrison: December 8, 1939, a letter from Mr. Pearce to Mr. Burnham. We offer this letter in evidence, if the Court please.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit W.)

(Testimony of George B. Burnham.)

“Department of Justice, Room 1904, U. S.
Court House, Foley Square, New York,
N. Y. File No. 60-44-13.

December 8, 1939.

“Mr. G. B. Burnham
214 E. C. Lyon Building
Reno, Nevada

Dear Sir:

Your letter of November 22, 1939, addressed to Honorable Thurman W. Arnold, Assistant Attorney General, attention Mr. Berge, with the enclosures, has been forwarded to me here for my attention.

The practices of potash companies come within the [330] general scope of the fertilizer investigation which the Department is conducting.

Please forward to me any documentary evidence which you may have in your possession sustaining the views expressed in the correspondence in our possession. We can arrange to have copies made and return the originals to you, if desired.

Also, if agreeable to you, I should like to have a representative call upon you at Reno, Nevada, so that you may be enabled to give him further detailed information regarding these matters.

Very truly yours,

CHARLES C. PEARCE,

Special Assistant to the
General.”

(Testimony of George B. Burnham.)

Q. And you have a copy of your reply?

A. This is the copy of the reply.

Mr. Harrison: I offer this copy of reply to the Department of Justice, Attention Mr. Pearce, dated December 18, 1939, from G. B. Burnham, as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit X.)

"Muskogee, Okla., Dec. 18, 1939.

"Department of Justice,
Room 1904
U. S. Court House,
Foley Square,
New York City, New York.

Attention: Charles C. Pearce.

"Gentlemen:

Your letter of Dec. 8, 1939, was forwarded to me at Muskogee, Oklahoma. I am traveling around and may not get back to my office for a few weeks yet, but I will be glad to confer with your representative there, or at my home at 2823 Kelsey St., Berkeley, Calif. I will arrive at my home in Berkeley, California, before I reach my office in Reno, and, if you wish, I can communicate with your San Francisco office upon my arrival.

I do not know just what documentary evidence you desire, but in case you want to know the prices

(Testimony of George B. Burnham.)

to which borax was cut in 1928 this information can be obtained from Mr. A. C. Hill, 6066 Rockridge Blvd., Oakland, Calif. He is the Secretary-Treasurer of the Burnham Chemical Co. and much of our files on the sale of our borax is in his possession. I am sending him copies of our correspondence.

In case you desire to see the letter of Oct. 8, 1926, from Mr. Stephen T. Mather to Mr. Whitney, that is in the possession of Mr. Whitney, whose office is at 433 California Street, San Francisco, Calif. Mr. Whitney was Vice-President of the Burnham Chemical Co. at the time the letter was written to him. I am writing him explaining your request.

Enclosed herein is a copy of our cost of producing borax for the month of October, 1928. Further information on this cost can also be obtained from Mr. C. G. Hill. [332]

It should be remembered that this operating cost of \$26.67 a ton for borax was for a very small capacity plant producing just the one product—borax—from the brine. If we had had a large capacity borax plant and also if we had been recovering potash and other chemicals from the brine at the same time, our cost of production would have been a great deal less. However, even at an operating cost of \$26.67 a ton we could have made a substantial profit if the price of borax had remained up. The very month we started production in June, 1928, the price war on borax started. Our borax

(Testimony of George B. Burnham.)

was 99½% pure and was made by the solar evaporation of the Searles Lake brine. We required no expensive fuel oil to evaporate the brine as do the American Potash & Chemical Co. But our process was patented and they did not want us to succeed; so they started the price war.

Enclosed herein you will note a copy of an article prepared by the American Economic Committee for Palestine in which they describe the cheap solar evaporation process of potash production from the Dead Sea, in Palestine, as follows:

“The Palestine method of production is as follows:

(1) the water of the Dead Sea is pumped into large, large shallow pans;

(2) the hot sun shining over the pans evaporates the [333] sea water leaving the potassium chloride and magnesium bromide and vast quantities of common salt; and

(3) the fresh water of the Jordan is used to dissolve the impurities in the raw potash produced in the pans and so refines the potash. While this method is simple and cheap, low cost of production is offset by the somewhat primitive transport facilities.”

If the solar evaporation process could have a fair chance to be developed at Searles Lake in California like it has at the Dead Sea in Palestine, I am convinced the process would make potash, borax and other chemicals far cheaper than the artificial

(Testimony of George B. Burnham.)

evaporation method now used by the Borax Trust at Searles Lake. Of course the process would be different as the brine of Searles Lake is different, but it should be cheap.

I believe the Government should help the Burnham Chemical Co. develop its solar process for producing potash and other chemicals from Searles Lake brine. In my opinion, that is the secret for cheap potash for the American farmer.

Should you desire any further information I will be glad to furnish it.

Yours sincerely,

G. B. BURNHAM."

Q. (By Mr. Harrison): Calling your attention to this letter [334] which I have just read, Mr. Burnham, isn't it a fact that apart from the reference to the operations in Palestine, you told Mr. Berge in your interview with him in November substantially what is stated in this letter of December 18, 1939, to Mr. Pearce?

A. Yes, although there are a few other things in that letter.

Q. Generally speaking, apart from that matter, you had told Mr. Berge what you told Mr. Pearce in that letter? A. Yes.

Q. Did you have further correspondence with the Department of Justice in that month, or the following month?

A. The letter to Mr. Clark, Morris Clark.

Q. January 30, 1940?

A. Yes, about that time.

(Testimony of George B. Burnham.)

Q. Have you a letter of January 5, 1940, to Mr. Pearce?

Mr. Carr: That is the one you are going to take up now?

Mr. Harrison: Yes, that is in chronological order, January 5, 1940.

The Witness: Yes, I have it.

Mr. Harrison: We offer in evidence this letter of January 5, 1940, to the Department of Justice, signed by the witness.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit Y.)

Mr. Harrison: "January 5, 1940.
"Department of Justice
Room 1904 U. S. Court House
Foley Square, New York, N. Y.

Attention: Charles C. Pearce.

"Gentlemen:

Referring to your letter of December 8th, 1939, in regard to having a representative of your Department call upon me in order to get further information on the practices of potash producers, I will be at my office in Reno for the next several days.

I arrived at my home in Berkeley, California, on January 2nd, but was there only a short time and then came on up here to Reno, Nevada. It looks like I will be in Reno for about one week

(Testimony of George B. Burnham.)

and then I may return to Berkeley, California, for another week. After that I may go east again, although that is not certain. My address in Berkeley is: 2823 Kelsey Street.

The price cutting on borax, mentioned in my December 18, 1939, letter to you occurred in June, 1928. The price cutting drove the Burnham Chemical Co. out of business and prevented us from building up a plant to produce potash, borax and other chemicals at Searles Lake, California. In the June, 1928, issue of Chemical and Metallurgical Engineering magazine (Vol. 35, page 390) the following quotations are given on borax in barrels in the New York market. June, 1928, prices were $2\frac{1}{2}c$ to $3c$ per pound. The month previous was $4c$ to $4\frac{1}{2}c$ per pound and the year previous was $4\frac{1}{4}c$ to $4\frac{1}{2}c$ per pound. The price of $4c$ per pound is \$80.00 per ton and $2\frac{1}{2}c$ per [336] pound corresponds to \$50.00 per ton.

The freight cost to ship borax from Searles Lake, California, to New York was about \$20.00 per ton, hence the price of borax f.o.b. plant was reduced from \$60.00 per ton to \$30.00 per ton. In other words, the price of borax was cut in half at the plant the very month we started production. About three months later it was down to about \$18.00 per ton f.o.b. plant.

On page 389 of the June, 1928, issue of Chemical and Metallurgical Engineering Magazine, the following statement is made:

(Testimony of George B. Burnham.)

‘Among important price changes in market for chemicals during the past month was a drastic decline in quotations for borax and boric acid. Improved processes by which production costs have been lowered is given as the reason underlying the price change.’

The statement that improved processes caused the price reduction does not entirely fit into the facts. The newly discovered borax deposits in the Kramer Borax District, California, in 1925 no doubt has had some influence on the price of borax, but the Kramer field was producing borax for about a year and a half before we started production. The processes at Kramer and Searles Lake were fairly well established. Yet the very month [337] we started production they cut the price in half. If the processes were being improved you would expect a more gradual lowering of price. I will be glad to go into this in more detail with your representative when he calls.

Since my stay in Reno and Berkeley will be short, I have decided to wire you as per enclosed copy.

Yours truly,

G. B. BURNHAM.”

Q. (By Mr. Harrison): And then after that you wrote Mr. Clark, did you not, Mr. Burnham?

A. Yes.

Q. Have you a copy of that letter?

A. Yes, January 30, 1940.

(Testimony of George B. Burnham.)

Q. Yes, January 30, 1940. I offer this letter. in evidence as Defendants' next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit Z.)

Mr. Harrison: "January 30, 1940

"Mr. Morris Clark

U. S. Department of Justice

Room 422, Post Office Building

7th and Market Streets

San Francisco, California

New York File No. 60-44-13

Dear Sir:

Referring to our conversation a few days ago I have been checking up on the prevailing price of borax and I find that borax in bags is quoted in the 'Chemical and Metallurgical Engineering' magazine for January, 1940, at [338] \$48.00 to \$51.00 per ton f.o.b. New York. This price is for earload quantities. The price range varies with the kind of borax, that is, powdered, granulated, or crystal borax. Freight from Trona (Searles Lake), California, to New York by rail (80,000 lbs. minimum earload) is \$17.60 per ton making the price \$30.40 to \$33.40 per ton f.o.b. Trona, California, today.

As mentioned in my letter of January 5, 1940, to Mr. Charles C. Pearee of your New York office, the price of borax dropped from about \$60.00 per ton f.o.b. Searles Lake to about \$30.00 per ton in June, 1928. The enclosed photostat copies of pages

(Testimony of George B. Burnham.)

in the 'Chemical and Metallurgical Engineering' magazine for June, 1928, show a drastic cut in price for borax for that month compared to the previous month. On page 389 of this same June issue there is statement about this 'drastic decline in quotations for borax. . . .' That was the very month we started our borax production, June, 1928. We continued our production until January, 1929, and we were then forced to shut down due to price cutting. From stocks of borax on hand we continued to sell borax until the fall of 1929. During this period the price of borax continued to fall still more. Attached are copies of letters showing that we received as low as \$17.64 per ton net f.o.b. plant in August, 1929, for some of our borax shipped to Europe on [339] consignment and sold in competitive markets in competition with the Borax Trust.

The photostat copy of the telegram enclosed also shows our competitor was quoting \$40.00 a ton for borax delivered in Ohio, U. S. A., in April, 1929. We had to meet this price and you will note we sold some borax in the summer of 1929 to Proctor & Gamble Company in Ohio through the Globe Chemical Company at \$40.00 per ton delivered. After deducting freight and 5% brokerage that borax net us only \$19.27 f.o.b. plant.

By the fall of 1929 all the borax stored in our warehouse was sold. We were shut down and without funds to renew operation because we had been forced to sell borax below cost of production.

(Testimony of George B. Burnham.)

So in November, 1929, since we had been forced out of business, the market price of borax went up to \$.03 per pound or \$60.00 per ton f.o.b. New York as shown on the page 710 of the 'Chemical and Metallurgical Engineering' magazine for November, 1929. On page 709 of the November, 1929, issue a statement is made that the prices of 'Borax and boric acid are higher.' \$60.00 a ton f.o.b. New York would correspond to about \$40.00 a ton f.o.b. Searles Lake. Yet just a few months before that we got less than \$20.00 a ton for our borax f.o.b. Searles Lake.

As long as we threatened renewal of our [340] production or had stocks of borax on hand, the price stayed down, but when all our borax was sold and we were eliminated as a competitor the price went up. We were a potential producer of potash and therefore when we were eliminated as a borax producer we were also eliminated as a future potash producer.

Another interesting point to consider is that this price increase took place in November, 1929. Yet about two months prior to that time the financial crash of 1929 had started. The world-wide depression had begun with stumbling stock market prices. In spite of the fact that one of the biggest depressions in history was upon the world, the Trust raised the price of its borax. That is further evidence that the rise in price was because we were eliminatd as a competitor.

However the long duration of the depression and

(Testimony of George B. Burnham.)

the cheaper source of borax in the new Kramer Borax Field has kept the price down, so it has never as yet returned to its former price level that existed prior to June, 1928.

Trusting this information will be helpful to you, I remain,

Yours sincerely,

G. B. Burnham,

President of the Burnham
Chemical Company."

Q. (By Mr. Harrison): Now, calling your attention to the statement of facts contained in that letter with respect to the price fall in June and with respect to the rise in November, 1929, [341] you knew of that price fall and that price rise when they respectively occurred, did you not?

A. Yes.

Q. And, of course, you knew that the price rise occurred in November, 1929, after you had sold all of the borax on hand? A. Yes.

Q. You had discontinued producing borax by the end of 1928 or the beginning of 1929, isn't that true? A. Discontinued production, yes.

Q. And you had still some borax on hand?

A. Yes.

Q. All of that borax was sold before the price began to rise in the manner described in this letter?

A. Yes.

The Court: We will take the afternoon recess now, ladies and gentlemen. Please bear in mind the admonition of the court.

(Recess.)

(Testimony of George B. Burnham.)

Q. Mr. Burnham, going back to the matter of the Post Office Fraud, you filed suit to enjoin the enforcement of that order in the summer or fall of 1925, did you not?

A. In September, 1925.

Q. Yes. I call your attention to this letter to your stockholders dated December 3, 1925, which is printed. Was that sent to your stockholders on its date? A. Yes.

Mr. Carr: December what?

Mr. Harrison: December 3, 1925.

The Witness: Yes.

Q. And you signed it, did you not, or your facsimile signature was attached?

A. Well, I am not sure of the date it was mailed.

Q. About that time—on that date or shortly thereafter? A. Yes.

Mr. Harrison: I offer this as our next exhibit.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit AA.)

Mr. Harrison: I will read only three sentences from this:

“The officials of this Company have no apologies to make for the rigorous character of its defense against an unwarranted action by the Post Office which we contend was inspired by large competitors who are naturally alarmed that the new Burnham plant will become a formidable factor [343] in the borax field.

(Testimony of George B. Burnham.)

“We bow to the unmistakable compliment thus paid us by these interests. In all probability they have good and sufficient reasons for regarding us as competition to be reckoned with. By virtue of the Burnham Chemical Company’s new and improved processes, and its many millions of tons of raw materials we propose to give our competitors a fair fight for supremacy in the field. But our fight will be in the open and only by the fair methods known to reputable American institutions.”

That is the “pat-on-the-back” letter. I call your attention to this document or paper that is called “Lake of Treasure” and is dated February, 1926.

Mr. Carr: That is the “pat-on-the-back” letter?

Mr. Harrison: Yes, that is the “pat-on-the-back” letter. I call your attention to this document or paper that is dated February, 1926, and is entitled “Stockholders Confidential Edition,” and I will ask you if you distributed that newspaper to your stockholders at or about its date?

A. Yes.

Mr. Harrison: We offer this in evidence, if the Court please, as Defendants’ Exhibit next in order.

Mr. Carr: What is the date of that again?

Mr. Harrison: The date of that is February, 1926.

(The document dated February 26, 1926, was received in evidence and marked Defendants’ Exhibit AB.) [344]

(Testimony of George B. Burnham.)

Mr. Harrison: And I read from it the following statement:

Mr. Carr: Excuse me, Mr. Harrison, is that Defendants' Exhibit BB, Mr. Elkington?

The Clerk: Defendants' Exhibit AB.

Mr. Harrison: (Reading):

"Like a bolt from the blue comes the sudden action by the Post Office against this enterprise. Apparently at the instigation of certain foreign-controlled competitive chemical interests evidently seeking to be the only ones to recover these great rich deposits of borax and other minerals and who apparently had long been working in the dark to accomplish their ends, the United States Post Office suddenly issued an order which temporarily prevented the Burnham Chemical Company from receiving mail."

Q. The foreign-controlled competitive chemical interests referred to there are American Potash & Chemical Company and Pacific Coast Borax Company, are they not? A. Yes.

Q. Now, I call your attention to this Progress Report to Burnham stockholders with a note up in the righthand corner, "October, 1927," and I will ask you whether that was distributed to your stockholders in print about October, 1927?

A. Yes, I believe it was accompanying a letter that was dated at about that date. [345]

Q. Yes, I believe I have that letter. This is the

(Testimony of George B. Burnham.)

letter that accompanied that document, is it not?

A. I believe that's right. This document, this Progress Report accompanied this letter.

Mr. Harrison: Yes. I offer this Progress Report as the defendants' exhibit next in order and ask that the letter be marked for identification.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit AC, and the letter accompany Exhibit AC, was marked for Identification as Defendants' Exhibit AD.)

Mr. Carr: For identification?

Mr. Harrison: Yes, I don't care to offer it. You may, if you wish, Mr. Carr.

The Court: The Progress Report is AC.

Mr. Carr: You cannot read it, if it is only for identification.

Mr. Harrison: I am not reading the one I asked be marked for identification. The witness mentioned a letter that went with this.

Mr. Carr: You are reading from AB?

Mr. Harrison: No, from AC.

The Court: The letter will be marked Defendants' Exhibit AD For Identification.

Q. (By Mr. Harrison): You are familiar with this Progress [346] Report when it went to the stockholders? A. Yes.

Q. And you are familiar with the photograph which appears in the upper lefthand corner of the third page and which is entitled, "The Plant of the

(Testimony of George B. Burnham.)

American Potash & Chemical Company Who Doubled Their Production Several Months Ago”?

A. Yes.

Q. And that is a photograph of the plant of the American Potash & Chemical Company where that production had been doubled several months before October of 1927? A. Yes.

Mr. Harrison: We ask that this be passed to the jury so they can see it, if your Honor please.

The Court: Do you want to do it at this time?

Mr. Harrison: No, it can be done at the close of the session, or in the argument, perhaps.

The Court: Yes.

Mr. Carr: May I look at that?

Mr. Harrison: Yes, surely.

Mr. Carr: Thank you.

Q. (By Mr. Harrison): In June, 1928, when you started production, the process of the Pacific Coast Borax in Kramer field as well as the process of the American Potash & Chemical Company at Searles Lake had been well established, had they not, for some time? [347]

A. At what time do you refer?

Q. In June, 1928, when you started production and when the price cuts occurred?

A. Yes, the production from Kramer had been started a year and a half before, and of course at Searles Lake several years before.

Q. Yes. When you started east in August of 1939 and brought with you the copy of the Mather letter and the amended complaint in the Post Office

(Testimony of George B. Burnham.)

fraud suit and the Muir report, you did so, did you not, because you considered those letters to be important? A. Yes, sir.

Q. After the Zabriskie conversation on May 17, 1929, which you have described in your direct testimony, did you make any report to your stockholders, either orally or in writing, of what Mr. Zabriskie had told you?

A. I reported to the stockholders that the reduced price of borax was due to——

The Court: No, the question was, did you make any report to the stockholders as to what Mr. Zabriskie had said to you?

The Witness: A. No.

Q. (By Mr. Harrison): Did you make any report in writing to the members of the board of directors as to Mr. Zabriskie's statements to you?

A. No, not in writing. [348]

Q. Now, I call your attention, Mr. Burnham, to the language in your letter of November 18, 1939, to the Secretary of the Interior, in which you stated, "After we stopped our small production the price went up." The idea of the price going up after you had sold all your borax didn't first come into your head on November 18, 1939, did it? A. No.

Q. You realized long before 1939 that that fact might have a peculiar significance, did you not?

A. Yes, one significance would be that we were not selling any more borax and one less competitor would make the price go up.

(Testimony of George B. Burnham.)

Q. And they waited until you had sold your borax before they let the price go up?

A. It might have gone up automatically since we were out of selling.

Q. Well, the thought had occurred to you long before 1939, the fact that the price went up when you were out of business and sold your borax, might have a peculiar significance, would it not?

A. Yes, but there were two explanations of that.

Q. You attached importance to it long before 1939?

A. One reason was there was one less producer and that would make the price go up.

Q. As a matter of fact, the amount of borax you had in 1929 [349] was very, very small compared to the production of the American Potash & Chemical Company and Pacific Coast Borax Company, isn't that true?

A. Yes, but we were quoting prices to the consumer, and the consumer would naturally turn around to American Potash & Chemical Company and tell them, "I can get it less from Burnham Chemical Company," and that had an automatic effect of making prices go down.

Q. It wouldn't have an automatic effect if they were actually competing and offering lower prices, would it?

A. The laws of supply and demand—usually the more producers in the market the lower the prices.

Q. And yet it is a fact, is it not, that your pro-

(Testimony of George B. Burnham.)

duction in 1929 was infinitesimal compared to the production of these larger companies?

A. Well, yes——

Mr. Carr: What do you mean by “infinitesimal”?

Mr. Harrison: It was quite small compared to the others, is that right, Mr. Burnham?

A. Yes.

Q. They were the chief elements in the market, were they not?

A. But one producer making 1000 tons could offset the market tremendously.

Q. Were you trying to keep the price down in 1929?

A. Yes, but there are laws of supply and demand. [350]

Q. But didn't you attach importance long before 1939 to the fact that these two big competitors had cut the price the very month you started to produce, kept the price down for many months and as soon as you sold all your borax they raised the price again—both of them: Did you attach importance to that long before 1939?

A. There was importance to that, but after my talk with Zabriskie I believed Zazriskie on his theory of the law of supply and demand.

Q. You had had a good deal of experience in the borax market, had you not?

A. Yes, before we entered the market there were only five producers, and when we entered there were six.

(Testimony of George B. Burnham.)

Q. And the five remained?

A. And the five remained.

Q. And when you wrote Mr. Clark in January, 1940, you attached a great deal of importance to the fact that they had raised the price after your borax had been sold?

A. Yes, because new things had developed that made me suspicious that our competitors had conspired to control the price, but after my talk with Mr. Zabriskie my suspicions had been completely nullified.

Q. The thought occurred to you from time to time that, long before 1939 when your suspicion was aroused, that it was a peculiar circumstance that the price had gone down in June, [351] 1928, and stayed down until your small element was out of the market?

A. But there were two good explanations for it.

Q. I understand that, but I am asking you whether the thought occurred to you or not.

Mr. Carr: Let him answer the question.

The Court: Yes, but he always argues. Counsel can argue the effect of the answers.

Mr. Carr: I don't think it is an argument. It is an explanation. It is not an argument.

Q. (By Mr. Harrison): Now, then, have you a copy of the Burnham Crystals of 1929?

Mr. Carr: 1939?

Mr. Harrison: 1929.

Mr. Carr: Sometimes it is difficult to hear. I don't mean to annoy you by asking.

(Testimony of George B. Burnham.)

Mr. Harrison: No, don't hesitate.

Q. By the way, while you are looking for that, Mr. Burnham, do you mind telling us what the "Burnham Crystals" are or were?

A. "Burnham Crystals" was in the nature of a progress report to our stockholders telling the stockholders what was being accomplished at the plant; what production was being made, and it was in the nature of a progress report.

Q. It was a printed sheet you sent out to your stockholders [352] from time to time?

A. Yes.

Q. And you called them the "Burnham Crystals"? A. That's right.

Q. Do you have that paper now?

A. You asked for April, 1929?

Q. Yes? A. Yes, this is one.

Mr. Harrison: We offer this in evidence as Defendants' Exhibit next in order.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit AE.)

Mr. Harrison: May I read two passages from this number of "Burnham Crystals"? This is one of April, 1929:

"Just at the time we started producing the price was cut by our competitors to \$30 per ton at the plant, or \$50 delivered to any destination. The average freight rate is about \$20 per ton. We have sold some of our borax, but not

(Testimony of George B. Burnham.)

all. With every attempt of our agents to sell our borax our competitor cuts the price lower, with the result that today the price of borax is only \$19 per ton at the plant."

Again:

"Our competitor who is cutting the price is making nearly half of the world's borax. With such a huge [353] production as he is now making he is in a position to control prices on borax. His plant is just four miles from our plant. He makes his borax from Searles Lake brine. We are convinced he is using our patented processes to make his borax. Using our processes and cutting the price to drive us out of business. What could be more unjust."

Now, the term "our competitor", as used in that last paragraph refers to the American Potash & Chemical Company, does it not? A. Yes.

Q. Will you now produce the "Burnham Crystals" for March, 1930? I have a copy here. This is a true copy, isn't it?

A. I did not know I would be called upon for these.

Q. That is a copy? A. Yes.

Q. And it was distributed on or about its date, March 30, to all the stockholders? A. Yes.

Mr. Harrison: We offer this in evidence.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit AF.)

(Testimony of George B. Burnham.)

Mr. Harrison: That contains this statement, ladies and gentlemen of the jury:

“Our two main competitors in borax, one at Searles Lake, and the other at Kramer, California, make about ninety [354] per cent of the world’s borax. These two companies together completely control the borax price. However, they only make about five per cent of the world’s requirement for potash and hence they cannot control the price of potash.”

Q. Now, the two companies referred to in that statement, Mr. Burnham, were the American Potash & Chemical Company and the Pacific Coast Borax Company, is that not true? A. Yes.

Q. Have you, Mr. Burnham, a copy of your letter to the stockholders of January 13, 1940?

A. Yes, here is a copy.

Q. This is a copy, is it not? You produced that in the deposition? A. Yes.

Mr. Harrison: I offer this in evidence as Defendants’ Exhibit next in order, Mr. Clerk.

(The document in question was thereupon received in evidence and marked Defendants’ Exhibit AG.)

Mr. Harrison: This is a letter on the letterhead of George B. Burnham, Reno, Nevada, dated January 13, 1930.

The Witness: That is January 13, 1940.

Mr. Harrison: Excuse me, that is dated January 13, 1940, and reads as follows: [355]

(Testimony of George B. Burnham.)

“Dear Fellow Stockholder

“Last August I wrote you about the Burnham Chemical Co. I mentioned a hearing in Washington, D. C., on September 12, 1939, which I planned to attend. I attended the hearing and I am convinced that the Government is beginning to take our view regarding the disposition of certain valuable borax deposits in the Kramer Borax District, California.

For some time I have talked about the British owned potash and borax interests getting most of the potash and borax deposits in this country and driving out American competition. Well! Now the United States Department of Justice is investigating the potash producers of this country for their alleged violation of the Sherman Anti-Trust laws.

Q. Now, when you referred to the fact that for some time you had been talking about the British owned potash and borax interests getting the most of the borax and potash deposits in this country and driving out American competition, over what period of time did you refer?

A. I had in mind the whole period of the time when we were driven out of production.

Q. Since 1929? A. Yes.

Q. Reading on, Mr. Burnham: [356]

“British-owned interests are even trying to get the land at Searles Lake formerly held by

(Testimony of George B. Burnham.)

us. Enclosed is a copy of a letter to the Secretary of the Interior, dated November 18, 1939, protesting the granting of further lands at Searles Lake to foreign-owned interests and asking the Department of the Interior to return to us our lease and to assist us to get a Government loan to develop it.

“Just think—British-owned interests at Searles Lake have now produced about \$70,000,000.00 worth of chemicals from the lake brine and about 80% of the profits from this production are going to stockholders residing in England. As long as they are making profits the Burnham Chemical Co. could have made profits too, if it had had the capital. If the Post Office had not issued the Fraud Order against the Company in 1925, I believe the Burnham Chemical Co. today might have been as big a success as this foreign-owned company. You and the other stockholders of our Company would probably be getting much of the profits from the Searles Lake deposits instead of foreign stockholders getting practically all the profits. The mineral wealth of this country should go to Americans, not foreigners. In fact, the Government itself was a victim of that unjust fraud order because it has lost the royalty on production that our Company would have paid to it and also the Government has lost the income tax on dividends that [357] our

(Testimony of George B. Burnham.)

stockholders would have paid the Government had we got into production.”

Q. Now, the fact is, is it not, Mr. Burnham, that your suit to enjoin the enforcement of the Post Office fraud order was delayed for a considerable time: it was first filed in September of 1925, was it not?

A. Yes.

Q. You filed an amended complaint in April of 1936. That complaint has been introduced in evidence, has it not?

A. 1926?

Q. 1926, excuse me.

A. Yes.

Q. There was no hearing on your application for a temporary injunction until January, 1930?

A. That's right.

Q. And the delay from 1926 to a few months before January of 1930 was due to the fact that the company lacked funds with which to prosecute the suit, is that not true?

A. There were several reasons.

Q. That was one of them, was it not?

A. What money that would come in was for the particular purpose of completing the borax plant.

Q. So that what money you had was money you could only use for completing the plant and you did not have in addition to that money sufficient funds to have your attorneys continue [358] with the prosecution of the suit?

A. That was one of the reasons.

Q. What other reason was there that you did not have sufficient funds that had to be devoted to building up your plant?

(Testimony of George B. Burnham.)

A. One of the reasons was that if we could build a plant and get into production that would solve all the accusations the Post Office made against us, because we would be producing and making money. That would have settled the Post Office fraud and would be better than a lot of affidavits and court trial.

Another reason for the delay of bringing that action was, I believe, the court calendar was crowded and Mr. Townsend was not any too well. There were several reasons, but I think the main reason in the final analysis is that the money should be devoted to construction in the plant and get that finished rather than to be spent in litigation.

Q. But at any event, after you devoted the money you thought was necessary to build the plant you did not have sufficient funds left with which to prosecute the suit more promptly. That is true enough, isn't it? A. Yes.

Q. Now, then, you had a claim which you believed to be good against American Potash & Chemical Company on account of this claim of patent infringement? A. Yes. [359]

Q. And you never brought suit against the American Potash & Chemical Company on that claim, did you?

A. We served notice of the infringement on them, but you never brought suit? A. No.

Q. And yet all the while you thought you had a good claim against them? A. Yes.

(Testimony of George B. Burnham.)

Q. And you failed to bring suit against them because of lack of funds, did you not?

A. Yes.

Q. I have already called attention to your statement in your letter to Mr. Arnold with respect to lack of funds to prosecute the claim herein involved. Now, several people have been mentioned in the course of your testimony here and I want to ask you whether these people are dead or alive. First, Mr. Zabriskie is dead?

A. Yes.

Q. Mr. Mather is dead? A. Yes.

Q. Judge Heney is dead? Yes.

Q. Mr. Townsend is dead? A. Yes. [360]

Q. Mr. R. C. Baker, President of the Borax Consolidated, is dead, is he not?

A. I don't know, but maybe he is.

Q. Mr. Whitney is dead? Yes.

Q. Senator Pittman is dead? A. Yes.

Q. Dr. Suckow is dead? A. Yes.

Q. Will you produce a copy of this statement by Mr. Muir about the monopoly against the Burnham Chemical Company?

A. You have a copy?

Q. I have a copy? A. Yes.

Q. While looking for that I will ask you whether or, Mr. Burnham, you did not testify in your deposition at Page 414 as follows. Will you turn to that, please?

A. Yes, I have it.

“Q. Why was it, Mr. Burnham, that the plaintiff, Burnham Chemical Company, was unable to employ Mr. Townsend——”

(Testimony of George B. Burnham.)

Mr. Carr: Now, Mr. Harrison, let me suggest that is not in any sense contradictory, to what he has said here. You have no right to bring in any part of this deposition except for impeachment purposes. Now, you have asked him this question and he has answered it, and what you are about to read from in the deposition is just practically what he has answered to you here.

Mr. Harrison: I don't think I have covered this precise matter. It is not offered for the purpose of impeachment.

Mr. Carr: You have asked him that at great length as to the question of being broke. We admit they were broke and hard up.

Mr. Harrison: If you won't interrupt me, Mr. Carr, I will try to reciprocate.

The Court: I will overrule the objection. Proceed.

Mr. Carr: Go ahead and ask the question. That is the quickest way to go on.

Mr. Harrison: Well, the objection is overruled.

Mr. Carr: That is good enough.

Q. (By Mr. Harrison): I will ask you if you did not testify as follows, Mr. Burnham:

"Q. Why was it, Mr. Burnham, that the plaintiff, Burnham Chemical Company, was unable to employ Mr. Townsend or Mr. Heney to continue the investigation in search for evidence to support your charge after 1929?

"A. Because we were practically broke and

(Testimony of George B. Burnham.)

what money we did have was sent to us by our stockholders for other purposes.”

You so testified? A. Yes. [362]

Q. And that is the fact?

Mr. Carr: He has already testified to that.

Q. (By Mr. Harrison): Now, the charge that is referred to in this testimony in the deposition was the charge of conspiracy in violation of the Anti-Trust laws, was it not?

A. What was the question? [362-A]

Q. I say the charge that was referred to in the testimony which I have just quoted was the charge that these defendants had injured you in violation of the Anti-Trust Laws? A. Yes.

Q. Whereas the charge I asked you about a few moments ago, and which Mr. Carr apparently thought was the same thing, was the prosecution of the Nevada suit with respect to the fraud order, isn't that true, do you get my point, Mr. Burnham? I will withdraw it.

The Court: I think you have made it clear. Ask him about a different subject now.

Q. (By Mr. Harrison): Is this the document that you handed to us, a copy of the Muir statement? A. Yes, that is it.

Q. That was enclosed, was it not, Mr. Burnham, with the letter you wrote Mr. Arnold in November, 1939? A. Yes.

Q. November 22, 1939?

A. November 22, 1939, yes.

Q. You gave it to Mr. Arnold. That is exhibit next in order.

(Testimony of George B. Burnham.)

(The document in question was thereupon received in evidence and marked Defendants' Exhibit AH.)

Mr. Harrison: This is the draft of Mr. Muir, stockholder of the plaintiff corporation, which Mr. Burnham forwarded to Mr. Arnold with his letter of November, 1939. It is a long [363] statement comprising some 35 pages. I only desire to read parts of it and if Mr. Carr wishes to read anything else in it, that is perfectly agreeable to me. It is entitled "Foreign-owned Monopoly vs. The People of the United States, By James Muir." It reads in part as follows:

"In his monopoly message to Congress on April 29th, 1938 President Franklin D. Roosevelt warned the Nation again 'Facism-ownership of Government by an individual, by a group, or by any other controlling power.' "

Later on that page:

"Fifteen years ago an inventor by the name of G. B. Burnham invited the general public to purchase stock in the Burnham Chemical Co. and share in some of the potash and borax wealth of the Nation."

The next page:

"Seven thousand American citizens, mostly people of small means, bought treasury stock in the Burnham Chemical Co. in the hopes of

(Testimony of George B. Burnham.)

sharing in some of the profits. But the borax industry was in the control of an English-owned borax trust and a competitor would be detrimental to the trust. So it happens that every time the infant enterprise made a little progress, the monopoly, or even some Government official, would hit the struggling infant over the head and down it would fall. Finally, in June 1937 some of the 7000 stockholders who resided in Philadelphia, [364] led by Mr. Frank B. Stockley, an attorney, asked the Government to aid the Company. Instead of getting aid, however, the 7000 American citizens, all people of limited means, some who had given their all to develop Government property, were given just another knock in the head.

“Now, who are they ‘in and out of the halls of Government who encourage the growing restriction of competition?’ Who are these people who are aiding monopoly in order that the rich can get richer and the poor get poorer?”

“Let us describe some of these potash and borax deposits and recite a little of the history of this Burnham Chemical Co.”

The next is headed “The Searles Lake Deposit,” and at the bottom:

“The mining claims of about 2240 acres on the mud flats were patented in the '70 and '80's and about 100 acres of these claims extended on to the crystal body. The claims are now owned

(Testimony of George B. Burnham.)

by the San Bernardino Borax Mining Co., Which is a subsidiary of the Pacific Coast Borax Co. The principal stockholders of the Pacific Coast Borax Co. are subjects of England. The Pacific Coast Borax Co. sell the 20 Mule Team brand of borax, the only package borax on the market, because the borax trust has apparently forced all others out of the field of competition.

“About 1908 the entire Searles Lake deposit was located under the placer mining laws by C. E. Dolbear and others [365] except for the patented lands above mentioned. The deposit was found to contain immense deposits of borax and soda. The company was organized to develop the property. The control of the company fell into the hands of another British corporation in 1909. The principal borax production of the world is made by these two British interests. Probably at the start these two companies were separate competing companies, but today it is believed that an office in London controls the two companies.”

On page 8:

“In 1918 eleven leases were awarded. One of the leases was granted to G. B. Burnham because he believed that solar evaporation could be economically used to evaporate the brine and thus make potash cheaply.

“In order to acquire a lease a bond had to

(Testimony of George B. Burnham.)

he put up to guarantee faithful performance of the terms of the lease. Bonds for about four of the leases were arranged for by the English-owned Pacific Coast Borax Co., including the bond for G. B. Burnham, who at that time (September 1918) was working for the Pacific Coast Borax Co. in carrying out experiments at Searles Lake to develop his solar processes. Mr. Burnham expected the Pacific Coast Borax Co. would finance his lease. Later, in 1919 the Pacific Coast Borax decided not to go ahead with the financing of any of the leases for which they [366] furnished bond. It, therefore, discharged Mr. G. B. Burnham, who was in their employ, in June 1919 and declined to aid him in the development of his lease, although they had arranged for an \$18,000 bond, so that he could get the lease. They also refused to help the other lessees for whom they had arranged bonds, stating that the World War had come to an end and the price of potash would soon go back to normal and that it would therefore not be feasible to make potash from Searles Lake brine even by the use of Mr. Burnham's solar process, although Mr. Burnham showed in his experimental reports that great economies could be made by large scale solar evaporation methods. But the making of large amounts of potash would also result in the production of large amounts of cheap borax and that would be detrimental to the borax trust. So, Mr.

(Testimony of George B. Burnham.)

Burnham was discharged from the employment of the Pacific Coast Borax Company.

“Shortly thereafter, in the fall of 1919, the Pacific Coast Borax Co., through their subsidiary, the San Bernardino Borax Mining Co., applied for 3102 acres of land suitable for building solar evaporation ponds at the south end of Searles Lake.”

“In their defense of their application for a patent to this clay land to build ponds to evaporate the brine by solar methods, the San Bernardino Borax Mining Co. [367] stated that ‘the commercial solution of the Searles Lake Potash problem is now believed to lie in the development of a process of solar evaporation. This process requires broad areas of shallow ponds with the necessary pipe-line connections.’

“Thus, the Borax Trust put itself on record to show that it realized the great possibilities of solar evaporation and the economies that could be effected. It endorsed the solar evaporation method upon which it had spent a year and a half of experimentation under the direction of Mr. G. B. Burnham. But apparently the trust reasoned ‘why develop a cheap process unless it can control its use?’ They reasoned that unless they had a large part of Searles Lake solar pond land they did not desire to encourage production by solar methods as it would only invite competition. Therefore, when they were denied this solar pond land as a result of the protest

(Testimony of George B. Burnham.)

of Mr. Burnham, and the other lessees, the borax trust took no further steps to develop the solar process although it had considerable solar pond land in the 2240 acres of land that were patented in the 70's. All the evidence points to a policy of the trust to either control the entire situation at Searles Lake, or else do nothing at all in hopes that no one else would do anything.

“But what greater endorsement of the solar method of [368] recovery of the salts from Searles Lake brine could be found than their application for 3102 acres of solar pond land and their statement under oath that ‘the commercial solution of the Searles Lake potash problem is now believed to lie in the development of a process of solar evaporation?’ The very process which a few months previous they had told Mr. Burnham they did not want to use and discharged Mr. Burnham from their employment. It also shows that Mr. Burnham was double-crossed. The trust wanted to use his process, but did not want to pay him anything for it.

“Their application also indicated an attempt to defraud the Government of royalties from production. This application for a pipe-line right-of-way from their patented land to this huge 3102 acre reservoir site, if it had been granted, would have given them a chance to drain the brine out of the Reserve with payment of no royalty whatever to the Govern-

(Testimony of George B. Burnham.)

ment. It certainly shows the character of the Trust, as wanting to grab it all and pay the Government nothing."

On the next page:

"Over 7000 people became stockholders in the Burnham Chemical Company. The financing of the company was going along rapidly when the Post Office Department of the United States Government, apparently inspired by misinformation [369] and evidently influenced by Stephen T. Mather, of the Department of the Interior and who was associated with the truth, imposed a Post Office Fraud Order upon the Company."

The next heading, "Stephen T. Mather's Letter."

"In the dilemma which the company found itself the Vice-President of the Company, Mr. Clarence Whitney, wrote to his old friend, Mr. Stephen T. Mather to see if Mr. Mather could lend his influence to help the Company. Mr. Mather was head of the National Park Service of the Department of the Interior."

Then he quotes the letter from Mr. Mather, which has already been introduced in evidence.

Page 15:

"The main point about the letter is that Mr. Stephen T. Mather admits that he was responsible, in a measure, for having the fraud order

(Testimony of George B. Burnham.)

issued. In other words, the president of a competing borax company, a subsidiary of the Pacific Coast Borax Co. and a man who held a high position in the Department of the Interior admits he was in a measure responsible for having a post office fraud order issued against a competitor.

“Mr. Mather speaks of having found the literature in London. The head office of the Borax Trust is located in London. Did the head office bring the literature to [370] his attention?

“Mr. Mather decries the ‘indiscriminate efforts to sell stock to men, women and children all over the world.’ Apparently he gave no thought to the wrecking of the new investment of 7000 ‘men, women and children’ who had already invested when he influenced the Post Office to issue the fraud order. He preferred to wreck the investment of these 7000 ‘men, women and children’ rather than go to the Company and tell them they were directing their efforts the wrong way, or that they should amend their method of selling. No! It was better to wreck the investment of 7000 than to go to the Company and tell them to change their methods of financing.

“Mr. Mather sets up nothing in his letter that shows there was fraud committed. He could find no fraud. The only thing that worried him was that the Burnham Chemical Co.

(Testimony of George B. Burnham.)

was a competitor to the Borax Trust with whom he was associated and their production would mean competition to his company and a loss of profits to himself."

The next is headed, "Price Cutting of Borax." Page 16, Mr. Carr.

"The destruction of the investment of 7000 stockholders in the Burnham Chemical Co. was a serious matter. The Post Office Department did not seem to give any thought to that either. However, in spite of the fraud order some [371] 2300 stockholders out of 7000 sent in small amounts of funds to the company by money order express to help the company in its financial difficulty. The original plans of the Company were to make potash, borax, soda, sodium sulphate and salt. However, because of the difficulty to get adequate funds they decided just to make borax. So, in the winter of 1927 and 1928 the stockholders provided funds to complete the Borax Unit and thus enabled the Company to begin production of borax in June 1928, just three costly years after the Fraud Order was imposed, and with the Fraud Order still against the Company. At last it looked as though the troubles of the Company were over. The borax plant was rehabilitated and completed in the spring of 1928, and in June actual production of borax was started. But the very month the Company started operation saw the beginning

(Testimony of George B. Burnham.)

of a price war between the two largest producers of borax (both English-controlled corporations) which drove the selling prices down to the unbelievable price of \$18.00 per ton F.O.B. plant. Borax had never sold for less than \$60.00 a ton before and this was some \$40.00 lower than borax had ever sold before in its history. No producer could make profits at that price and a new company like the Burnham Chemical Co., without financial reserves, could not continue indefinitely to carry the losses entailed in operation. It would appear that the cut in price of borax was purposely timed to start the very month the Burnham Chemical Co. started borax production. Did the two English borax producers conspire to start a price war the very month the Burnham Chemical Co. started production? Were the two companies price war directed by a common management in London?"

The next page, 18, headed, "U. S. Court Finds No Evidence of Fraud," contains the following statements, among others:

"With the stigma of the Post Office Fraud Order removed the Company made some attempts to raise money to build a three product plant and place itself on a more even footing with the borax trust. However, by this time, the world wide depression made further attempts to raise capital exceedingly difficult.

(Testimony of George B. Burnham.)

Some attempt was made to produce common salt in order to be on a self-sustaining basis, but without adequate funds even that was impractical."

"Apparently the Post Office had forgotten all about the matter and for two years, until September, 1927, the Company continued to receive its mail." It should be 1937.

"But in September, 1937 the Fraud Order was reinstated. The Company held its lease until January 31, 1938, when it was finally cancelled because the Company could not pay its rent.

"Why was the Post Office Fraud Order reinstated? [373] Let us look a little more into the history of this borax drama."

Page 20:

"On January 14th, 1926 it appears in the records that the mineral locators to the land sold to the United States Borax Co., the subsidiary of the Pacific Coast Borax Co., their rights to their mineral location."

"In a short time, on September 11, 1926, Mr. Austin, for some unknown reason, withdrew the application that he had pending since January 1926 with respect to the Northeast Quarter of this Section 24, and on the same day, September 11, 1926, the United States Borax Company filed its application, not for a sodium lease, but

(Testimony of George B. Burnham.)

for a mineral patent, alleging in the patent application that the land was valuable for 'boric acids bearing material,' and making no acknowledgment of the discovery of borate of sodium, covered by the Leasing Act of 1920. All information that they had found sodium borate was kept a secret so that they could get ownership. They purposely called it 'boric acid bearing material' so that the Government would not know they had found sodium borate.

"Thus the evidence shows that the foreign-owned interest deceived the Government as to the nature of the deposits and Mr. Austin was induced to withdraw this application so that the Borax Trust could get ownership to [374] the deposits and thereby deprive the Government of royalties.

"The Burnham Chemical Co. has contested the matter of ownership to some of the valuable sodium borate deposits in this Kramer borax district but it has been of little avail. The feeble protest of a penniless corporation carries little weight in a conflict with a wealthy trust with their retinue of lawyers and technical experts. The supreme reward of ownership to the largest deposit of sodium borate in the world was bestowed upon the Borax Trust contrary to the intentions of Congress. How extraordinary ineffectual is any protest against a wealthy trust.

"The Government was evidently deceived as

(Testimony of George B. Burnham.)

to the true nature of these deposits; but the Government apparently takes no steps to correct it. Every Friday night the virtues of 20 Mule Team Borax are broadcast over the radio, yet for every pound of borax sold the Government and the people of the United States have been deprived of the royalties which Congress intended the Government should have. In my opinion, the Austin sodium applications and their withdrawal, and the prosecution of patent to the land, and the withholding of information from the Government that sodium borate was found, is fraud, and it is the most cunning example of deception practiced upon the Government in the history of land office transactions. Not only was [375] the Government injured and consequently the People of the United States, but it enabled the Trust to grow more and more wealthy and to cut the price of borax and drive the Burnham Chemical Co. out of business."

The next heading is, "The Carlsbad Potash Deposits."

"Since 1910 the Government has spent about \$3,000,000 to find and develop potash deposits. Two potash deposits of commercial value have been found, namely, the brines of Searles Lake in California and deep mine at Carlsbad in New Mexico. Searles Lake was placed in a potash reserve by Presidential Proclamation on Feb-

(Testimony of George B. Burnham.)

ruary 21, 1913 and the Carlsbad potash deposits by Presidential Proclamation on March 11, 1926.

“The original New Mexico potash producer was financed in 1930 by the Pacific Coast Borax Co. and they also acquired six contiguous Federal potash leases of 2560 acres each in addition to large acreages of State leases on lands granted to the State of New Mexico. The United States Potash Company was organized to take over the properties and the control was placed in the hands of the foreign-owned Pacific Coast Borax Co.”

“Apparently as a reward for assisting them in getting control of this valuable potash reserve in New Mexico, Horace M. Albright, head of the National Parks Service of the Department of the Interior, resigned from this [376] position with the Government in 1933 and was immediately given the position of Vice-President and General Manager of the United States Potash Co. What stronger evidence than that could one want to show that there are people in the Halls of Government who have been taking active efforts to help this monopoly to get control of the potash and borax in this country?

“Let us look at the situation from another point of view. The acquisition through ownership of the Kramer borax lands by the Borax Trust not only deprived the Government of royalties but was an injustice to Government

(Testimony of George B. Burnham.)

lessees who were developing other borax lands and paying the Government rents and royalties. The Trust simply had the advantage of paying no royalty, while the Burnham Chemical Co. was paying rents to the Government on its lease to the potash and borax lands in Searles Lake.

“In fact, the injustice was doubly great because the Trust was owned by foreign stockholders while the Burnham Chemical Company was owned by American citizens.” And then there is quoted at page 29 a letter to the President of the United States, a letter written to the President of the United States, signed by the Chairman of the Philadelphia Stockholders’ Committee of the Burnham Chemical Company, dated July 17, 1937, to “His Excellency, Franklin D. Roosevelt, President of the United States.” [377]

I will read certain passages from that letter:

“Again the Government granted ownership to the largest sodium borate deposit in the world to the Borax Trust, a foreign-owned concern, contrary to the law and the intention of Congress giving the trust a strangle hold on the borax industry and enabling them to drive us out of the competitive field, at the time we started our production. Had the government not denied us our rightful portion of these known sodium borate deposits, we would have

(Testimony of George B. Burnham.)

been a prosperous company today. The Government itself is again to be blamed for the results being 'unsatisfactory and discouraging.' "

"It is further stated that the views of the Department relative to sodium, borax and similar mineral products is set forth in the decision found in I.D. Volume 54, page 183, case of Burnham Chemical Co. vs. United States Borax Co., etc. The Burnham Chemical Co. has appealed from such a decision in a document recently sent to you. The title to the document is:

" 'Appeal to the Supervisory Executive Jurisdiction of the President of the United States from Refusal by Department of the Interior to Grant to Appellant a Sodium Lease upon Certain Lands, and Protest Against Issuance of Sodium Lease to Existing Monopoly After Denial of Appellant's Application Upon Ground that Existing Monopoly [378] had at that Time Already Applied for Mineral Patent Upon Said Land.' "

Then on page 32:

"Instead, however, the Post Office Fraud Order against the company was immediately reinstated in September, 1927, and the Company's lease cancelled. 'Someone in the Hall of Government surely took advantage of the technical situation of the Burnham Chemical Co. who only had a temporary injunction

(Testimony of George B. Burnham.)

against the Postmaster at Reno, Nevada. Their suit was dismissed in 1935, due to lack of prosecution by the Company, which was financially broke and it could not defend itself. Yet the Company continued to receive its mail just the same for over two years thereafter."

Page 33, "Evidence by Induction"

"Through inductive evidence one can reason that when foreign-owned companies get all the breaks and yet 7000 American citizens get all the knocks there must be some one in the Halls of Government that is helping the foreign-owned interests and deliberately blocking the efforts of 7000 American citizens.

"What stronger evidence would one want to show that there are such people in the Halls of Government when a high official in the Department of the Interior is made an officer in the British Borax Trust soon after control of [379] the Carlsbad potash deposits were obtained by the Trust?

"What stronger evidence would one want to show that the British Borax Trust itself was behind the various steps that have been taken to defeat the Burnham Chemical Co. and that it used the Government as a tool to accomplish it; that it induced the Post Office to issue a Fraud Order against the Burnham Chemical Company in order to eliminate a competitor, when Stephen T. Mather, a member of the

(Testimony of George B. Burnham.)

Borax Trust, admits that he was, in a measure, responsible for the Fraud Order?

“The Post Office Department, way back in 1925, said there were some statements in the company’s literature to sell stock, which were false (although every statement was true) and so it issued a Fraud Order against the Company and refused to deliver its mail, when there was no false statement and no fraud had been committed and thereby practically destroy the Company. But suppose there had been a statement in the Company’s literature that was not true, there was certainly no intention on the part of the management to deceive the public. Wasn’t it a bigger crime on the part of the Government to wreck the investment of 7000 stockholders just because it thought some statement was not true? It would be a thousand times better to point out the error and ask the Company to correct it, but the Government did not do that. It called for a hearing in Washington, D. C. The attorney [380] for the Company pointed out that all the statements in question were true, but the Government issued a Fraud Order just the same. It did not ask the Company to correct any statements. Does that not show that there was some other motive behind the issuing of that Fraud Order?

“In my opinion, it is inconceivable that our Post Office Department would issue a Fraud Order against the corporation and destroy the

(Testimony of George B. Burnham.)

investment of 7000 stockholders without first asking the corporation to change any statement the Government thought was incorrect. A fair-minded Government would not do such a thing and therefore it must have been the Borax Trust behind the Fraud Order, just as Stephen T. Mather's letter shows.

"Even if the Department of the Interior denies that it has been made the tool of the foreign-owned Borax Trust it makes no difference."

On the final page: "Constructive Action Needed."

"The solution to the difficulties now lay in constructive action by the Government to assist those 7000 American citizens to built a plant at Searles Lake, California. A plant of sufficient size to compete with the Borax Trust and offset British interests draining the American potash reserve.

"If the Government will adequately finance the stockholders [381] on a potash lease at Searles Lake the royalties accruing to the Government will ultimately far exceed the amount of the investment. In that way the Government will get some benefit from this potash reserve whereas it gets no benefits now from the Borax Trust at Searles Lake because the Government gave them ownership and deprived itself of royalties.

"Furthermore, 7000 citizens in the United

(Testimony of George B. Burnham.)

States would be getting profits instead of citizens in foreign lands. Their income can be taxed, but the income of foreign stockholders residing in foreign lands cannot be taxed.

“It is the Government’s duty to build up the wealth of our own citizens and not the wealth of foreigners.

“It would be a constructive step not only to help overcome the present condition in which, out of ‘every 300 persons in our population, one person received 78 cents out of every dollar of corporate dividends, while the other 299 persons divide up the other 22 cents among them.’ Also to prevent a British monopoly getting 100 cents out of every dollar of borax and potash profits.”

Mr. Carr: What is the date of that?

Mr. Harrison: That is undated, but the witness has testified it was given to him in 1938 by Mr. Muir. That is all the cross-examination, if your Honor please, unless I think of something.

The Court: We will take an adjournment until tomorrow morning at ten o’clock. In the meantime I will ask you to remember it is your duty not to discuss the case among yourselves or with anybody else or to form or express an opinion on the matter until it is finally submitted to you.

(An adjournment was thereupon taken until tomorrow, Wednesday, April 2, 1947, at 10:00 o’clock a.m.) [382-A]

Wednesday, April 2, 1947, 10:00 o'Clock A.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Harrison: If your Honor please, we have concluded our cross-examination.

GEORGE B. BURNHAM

recalled.

Redirect Examination

By Mr. Carr:

Q. Mr. Burnham, referring to Defendants' Exhibit 8, which is the letter to Mr. Thurman Arnold, how did that happen to be written?

A. At the request of Mr. Berge, Wendell Berge.

Mr. Carr: I do not recall whether all of that letter was read.

Mr. Harrison: Yes.

The Court: Yes, I think Mr. Harrison read it fully and went back over it again.

Q. (By Mr. Carr): You state in such letter, Mr. Burnham, that these attorneys who are now both deceased felt that we had a case, but we were so completely ruined as a result of the price war and also in debt that we were financially unable to employ the attorneys to go ahead with the matter. That letter had reference, did it not, to the price cuts? A. Yes. [383]

Q. And that is about all that it did have reference to? A. Yes.

Mr. Harrison: I object to that on the ground it speaks for itself.

(Testimony of George B. Burnham.)

The Court: Yes, I will sustain the objection.

Q. (By Mr. Carr): When did you have that consultation with your attorneys in which they stated that they felt that you had a case, do you recall?

A. That was along about August, July—July or August, 1928.

Q. And who were those attorneys?

A. Mr. B. D. Townsend and Mr. Francis J. Heney.

Q. Did they at that time explain in any way or for what reason they felt that you had a case?

A. Well, they felt that we had a case if we could get the evidence that there was any violation of the law, that we would have to find the evidence first.

Q. Did they tell you that you would have to find the evidence?

Mr. Harrison: I object to that on the ground it is highly leading, if the Court please.

Q. (By Mr. Carr): Did they or did they not—

Mr. Harrison: Same objection. The witness may be asked for the conversation. This is hardly the method to introduce—

Mr. Carr: We withdraw the question.

Q. What was the conversation in full, as nearly as you can remember it at this late period, Mr. Burnham, that occurred [384] at that particular time?

A. The price of borax had just dropped the month before, and we conferred with our attorneys

(Testimony of George B. Burnham.)

on the situation, and they said it was very peculiar that the price should fall just when we were starting production, and that it might indicate that there was some violation of the Sherman Anti-trust Law, but they would have to investigate to find out, find evidence first before they could do anything about it.

Q. Was there anything else said about the investigation?

A. Yes, they said not to discuss the matter among ourselves because they didn't want any information to get over to the competitors, and furthermore there was no need of talking about the subject until we had some facts.

Q. You also stated in that letter, "that we were financially unable to employ the attorneys to go ahead with the matter." What did the word "matter" refer to in that letter?

A. That referred to making investigations to find any evidence of violations, violating the Sherman Anti-trust Law.

Q. That did not refer to the prosecution of an action, did it? A. No.

Mr. Harrison: I object to that, if the Court please, on the ground it is highly leading.

The Court: Yes, it is a leading question. Sustained.

Q. (By Mr. Carr): Was the Burnham Chemical Company in finances at that time? [385]

A. No, because the price of borax had dropped

(Testimony of George B. Burnham.)

and we were in a precarious position. We were selling borax——

Q. But you were not entirely broke?

A. No, we were not entirely broke, but we were selling borax at the bare cost of production in August. We were just swapping dollars.

Q. What were you using your money for?

A. That money that had been sent to us by stockholders was for a definite purpose.

Q. What was that?

A. The construction of the plant and the operation of the plant, and not for any other purpose.

Q. After that conversation did you continue with any investigations or make any investigations to ascertain any of the facts suggested to you by these gentlemen?

A. Yes.

Mr. Harrison: That is objected to as immaterial, if the Court please, and I anticipate there may be a good many other questions on that ground. We submit it is immaterial what investigations were made. The question is what knowledge he had.

Mr. Carr: The question of whether he made little or no diligent or otherwise investigation we submit is material.

The Court: You are going to ask another question now instead of that one, Mr. Carr? [386]

Mr. Carr: No. Will you be good enough to read the question?

The Court: The answer may go out.

(The question was read by the reporter.)

(Testimony of George B. Burnham.)

Mr. Carr: We suggest that is proper because it is our duty to go ahead. I will withdraw the question and precede it with this question:

Q. At that time did you have any knowledge that these defendants, or, rather, the two of them involved, were violating the Anti-trust Law, or that this price cut had actually been brought about by conspiracy entered into by these two defendants?

A. No.

Mr. Harrison: That is objected to as being leading, if the Court please.

Mr. Carr: I am asking him if he has any knowledge. You said we have to prove knowledge. I want to prove that first.

The Court: The question you ask him now calls for his opinion and conclusion, does it not?

Mr. Carr: No, if he knows.

The Court: He already testified on direct examination that he had no knowledge on the subject, and then there was cross-examination as to facts over a long period of time. Now you are asking him the same question again that you asked him on direct examination.

Mr. Carr: No, this is a little different. I asked him [387] on direct, if it please your Honor, whether or not between the dates indicated he had any knowledge of the conspiracy. I am asking him now as to a specific conspiracy. The attempt was made by counsel in his very able cross-examination to show that we did have knowledge that these two defendants had conspired to bring about this price

(Testimony of George B. Burnham.)

cut. I want to refute that by his testimony, if we can, if he can so give it, that he had no such knowledge, and then I will follow it with an inquiry as to whether he made, pursuant to the suggestions of Mr. Heney and Mr. Townsend, any investigation. He cannot just sit down and do nothing. We want to prove he did go ahead and do his best to discover and find out some of the evidence suggested by Mr. Heney and Mr. Townsend, so as to show that he was diligent.

The Court: I do not know whether the question of diligence has anything to do with it.

Mr. Carr: Oh, if a man in a situation of this kind, may it please your Honor, has any intimation of even such things as the price cuts existing, and he has testified he was somewhat suspicious——

The Court: He has already said they did not have the money to go ahead and do that.

Mr. Carr: No, they did not have the money to afford the attorneys for such purpose, but what he did, I am asking him now, if it may please your Honor, what he did personally, [388] whether he carried on. The fact that he did not have the money to employ the attorneys, or rather, wished to use the money which he had for other purposes, the development of the plant rather than the employment of attorneys to make the investigation, certainly does not preclude him from investigating, himself, personally.

The Court: Suppose the testimony shows that he, himself, tried to investigate this matter and found out nothing?

(Testimony of George B. Burnham.)

Mr. Carr: He could get no action anywhere.

The Court: Never mind about getting action some place, but he, himself, found out nothing.

Mr. Carr: That is right.

The Court: How would that be germane to this issue?

Mr. Carr: It would show that he had no knowledge. He did not acquire any information as to the actual existence. It is not what he suspected or the suspicion which might have rested in his mind. It is the actual knowledge of the cause of action which he had. Your Honor, according to your pre-trial order on that very word "believe," which you have placed in that order gives us a right, we believe, to go ahead and show that we did everything that we could to ascertain whether or not we could secure any proof of the conspiracy. Now, they have gone very fully into it on cross-examination. They have done everything they could, Mr. Harrison very ably has, with the benefit of his people, to prove that we did nothing, your [389] Honor, just laid down.

The Court: I will overrule the objection subject to a motion to strike, and we will see what this testimony amounts to.

Mr. Harrison: If your Honor please, we should like to have the opportunity to present to your Honor, if your Honor is in doubt, the reasons why we believe the question of diligence is utterly immaterial. I do not think your Honor is in doubt.

(Testimony of George B. Burnham.)

The Court: I do not consider that that is a material aspect at all of the case, but on the question of knowledge—I assume since counsel asked the question he expects the witness to say he did everything in his power to find out and he didn't find out anything.

Mr. Carr: Your Honor is a mind reader.

Mr. Harrison: I assume so, your Honor.

The Court: That being the case, it might save a long line of examination if, subject to the court finally passing upon the materiality of that, it might be deemed that the witness would so testify, if that is the fact. I am just thinking in terms of saving the legal point and perhaps passing upon it when we finish with the evidence.

Mr. Harrison: The question, as I understand it now, that is directed to the witness was whether he knew. That, of course, has been asked on direct examination already. [390]

Mr. Carr: Not this specific one, Mr. Harrison. I asked him generally, following the pre-trial order, as to the dates, and asked him if he knew of the conspiracy, and you examined him at great length and attempted to show to the jury that because the price cuts occurred, why, we knew about the conspiracy. Now, the conspiracy is the basis of this action.

The Court: I know all that. I will overrule the objection. You ask him what question you have in mind. You can renew your objection, Mr. Harrison, and we will see how far we get with that.

(The question was read as follows:

(Testimony of George B. Burnham.)

“Q. At that time did you have any knowledge that these defendants, or, rather, the two of them involved, were violating the Anti-trust Law, or that this price cut had actually been brought about by conspiracy entered into by these two defendants?

A. No.”)

Q. (By Mr. Carr): After this conversation with Mr. Heney and Mr. Townsend did you make any investigation to determine whether or not such price cut was brought about by the endeavors or plans of the two defendants in question, and by the two defendants herein—I mean the Pacific Coast Borax Company and the American Potash & Chemical Company?

Mr. Harrison: That is objected to as irrelevant, incompetent and wholly immaterial, if the Court please. [391]

The Court: I will sustain that objection. You can ask him what he did.

Q. (By Mr. Carr): Mr. Burnham, after you had this conversation with Mr. Heney and Mr. Townsend did you do anything on the matter, yourself?

Mr. Harrison: That could be answered “Yes” or “No,” I assume.

Mr. Carr: Yes.

The Witness: I did a great many things.

Q. (By Mr. Carr): What were they?

Mr. Harrison: Now, if the Court please, I assume counsel intends by this question to prove ex-

(Testimony of George B. Burnham.)

actly what he offered to prove by his leading question a moment ago, and we therefore object to that on the ground that it is incompetent, irrelevant, and immaterial. Counsel's statement indicates that his purpose is to show diligence, and we submit that diligence is wholly immaterial in this case. Whether diligent or not, the question is what he knew, what he learned, and we therefore object to the question in view of counsel's evident and frank purpose, as being incompetent, irrelevant, and immaterial.

Mr. Carr: It is not a question of diligence. It is a question of whether he knew. Well, let me ask another question. Maybe it will clear the situation.

The Court: All right.

Q. (By Mr. Carr): As a result of those many things which you [392] say you did, did you ascertain whether or not these two defendants referred to had entered into a conspiracy or plan or scheme to cut the price?

Mr. Harrison: That is objected to on the ground it calls for the conclusion of the witness.

Mr. Carr: No, what he thought, what he found out.

Mr. Harrison: If the question is whether he learned a specific thing, that is one thing, but here is a question that obviously calls for the witness' conclusion.

Mr. Carr: We will go at it in another way.

Q. In the course of those many things which you

(Testimony of George B. Burnham.)

say you did, did you find out or ascertain whether or not these defendants had so conspired?

A. No.

The Court: I think that these questions are purely matters that you may argue either to the court or the jury at a later time, but it is the facts, what was done, that are germane to the matter, not what the witness thinks he learned.

Mr. Carr: Being put on notice, your Honor, it was his duty to go out and endeavor to ascertain whether such conspiracy existed.

The Court: I do not concede that there is any such law as that, that there is any duty on anybody to investigate anything. If a person has a knowledge, knows or has cause to believe that he has a cause of action against somebody else, or he hasn't, [393] there isn't any duty that rests upon him. If he does not protect his rights, he is not responsible to anybody except himself.

Mr. Carr: In a matter of this kind, as we read the California cases, and also the case of Foster & Kleiser, the duty rests upon a party in his position to endeavor to act and to ascertain. Well, will your Honor rule upon it, so we may have a record?

Mr. Harrison: We object to the question on the ground it is incompetent, irrelevant, and immaterial.

The Court: I will sustain the objection to the last question.

Q. (By Mr. Carr): Did you, as the result of those many things which you stated you did, believe

(Testimony of George B. Burnham.)

that you had a cause of action against these two defendants for conspiracy for the price cut which existed?

A. No, I did not believe it because——

Mr. Harrison: Just a moment. May that go out until I have a chance to object?

Mr. Carr: Yes, that may go out. Don't answer.

Mr. Harrison: I object to that on the ground it calls for a conclusion.

The Court: I will allow the answer to stand and I will reach this matter when it is argued later. You have in the record what you want on that point.

Mr. Carr: Yes, your Honor. May I see Exhibit H?

Referring to Exhibit H, which is the letter to the Secretary of the Interior, dated November 18, 1939. I think with your Honor's permission and with the courtesy of the jury I would like to read this letter as a whole. [394-a]

Mr. Carr: (Reading):

“Washington, D. C., November 18, 1939

“Secretary of the Interior,
Washington, D. C.

Sir:

“I understand that the American Potash & Chemical Corporation, of Trona, California, has applied for leases on potash lands in the Searles Lake Potash Reserve, in addition to 3,319 acres of patented land which they already own. Its application for

(Testimony of George B. Burnham.)

leases was made as a result of bids which the Commissioner of the General Land Office advertised for the leasing of the Searles Lake Potash Reserve under date of August 22, 1939. It is my understanding that two companies have placed bids, namely, the West End Chemical Company and the American Potash & Chemical Company, which are the two companies now operating at Searles Lake; and that practically the remaining portion of lands available at Searles Lake will probably be given to these two bidders.

“As President and a Stockholder of the Burnham Chemical Company and as a citizen of the United States, I protest the granting of any further potash lands, through lease or otherwise, to the American Potash & Chemical Co.; and I make this protest on behalf of 7,000 American citizens [395] who are stockholders of the Burnham Chemical Company. The reasons for my protest are as follows:

“(1.) The American Potash & Chemical Corporation and other fertilizer producers are now being investigated by the Anti-Trust Division of the Department of Justice for alleged violation of the Sherman Anti-Trust Laws. This corporation is a foreign-owned Company with about 80% of its stock held by foreign citizens residing in England. The corporation, together with another British-owned potash and borax producer in the United States, constitute a formidable monopoly of the potash and borax industry of this country. The

(Testimony of George B. Burnham.)

American Potash & Chemical Corporation already has 3,319 acres of land at Searles Lake, Calif., which it owns outright. It should not be granted additional land and thereby increase its monopoly, especially while it is being investigated by the Department of Justice. In fact, the granting to it of additional potash lands may ultimately give the British interests a strangle hold on the entire potash industry in this country.

“Both potash and borax are scarce. Potash is an essential fertilizer and is used by most farmers. Borax in one form or another is used by nearly everybody. There should be no monopoly of these important chemicals, and certainly no monopoly in foreign-owned hands. [396]

“We as a Nation are glad that we are not now dependent upon European potash as we have been in the past. We are inclined to boast about it. Yet, after all, most of our domestic potash production is controlled by Europeans. And the granting of more land to the foreign-owned interest may end up in Europe’s entire control of the industry in America.

“Certainly they should not be granted more land while the Anti-Trust Investigation is being conducted by the Department of Justice.

“(2.) At the time the American Potash & Chemical Corporation (or its predecessors) secured patent to its land in the Searles Lake Potash Reserve the granting of patents to its land was protested by the Land Office on the grounds that its Placer

(Testimony of George B. Burnham.)

Claims, under which they claimed the land, were in default due to the fact that they did not keep up their assessment work and that there never had been any law permitting mineral location of brines, and that they were aliens and not entitled to any of the public domain. Judge E. C. Finney states in his memorandum of November 27, 1917, on the matter of granting this land to this alien corporation, the following:

“(1) I believe that the Department should squarely hold, under the facts in this case as presented, the [397] solution carrying potash and other minerals is not of the character contemplated to be covered by mining laws and not subject to location and entry thereunder.

“(2) ‘I believe that the Department should hold that the Austin locations are invalid because made at a time when the Trona corporation was owned and controlled by aliens, and that the net result of those locations was for and in the interest of such aliens. There was such control at date of location and that control continues down to the present time, with the net result that if patents were issued the title, while not passing directly to the aliens, would inure to their benefit.

“‘It is true that Assistant Attorney General Van Devanter in a letter to the Secretary of State a number of years ago held that a company incorporated under the laws of the United States was entitled to take and hold mining lands, irrespective of the nationality of its stockholders. This, however,

(Testimony of George B. Burnham.)

was a mere opinion of a law officer and is not binding upon the Secretary of the Interior or upon the courts. Furthermore, it is a narrow construction, based upon the letter of the law and not upon its purpose and intent.

“ ‘Section 2319, Revised Statutes, expressly provides that mineral deposits of the United States are subject to occupation and purchase “by citizens of the United [398] States and those who have declared their intention to become such.” There can be no doubt but that this evidences a clear intent on the part of Congress that title to our public mineral lands should not pass to aliens. This is not an isolated instance, but is in harmony with other public-land laws which make similar requirements. The Homestead laws contain like requirements, and proof that a homestead entry is being made, directly or indirectly, for the benefit of aliens would result in its cancellation.

“ ‘Judge Lindley points out that this corporation was not only organized under the laws of the United States but that the incorporators were all citizens, and that this was the status at the time the so-called Dolbear locations were made. We have nothing whatever to do with the Dolbear locations. They are abandoned. The claim for patent does not rest upon them, but upon the Austin locations made in 1911, at a time when the company was controlled by aliens.

“(3.) ‘The mining laws never contemplated that one individual or one corporation should make hun-

(Testimony of George B. Burnham.)

dreds of contiguous locations upon a given deposit in a single day. Such a proceeding is antagonistic to fair play and entirely contrary to the spirit of the mining laws and [399] customs. It is a self-evident intent to monopolize deposits, to the detriment of the general public and of others interested in the development of mineral resources.

“(4.) ‘Believing as I do that this case should be disposed of with due regard to the spirit of the mining laws and their purpose and intent, in the interest of the general public. I believe that the Government should do equity to the extent of recognizing the fact that these claimants have expended a large sum of money in the building of a railroad and plant for the reduction of the product, and should, in denying their application for patent, afford an opportunity to take one or two leases of the maximum area under the act of October 2, 1917, provided the parties in interest can qualify as lessees under the act.’

“Therefore, inasmuch as its rights to own land in the Searles Lake Potash Reserve was questionable in the first place, it certainly should not have additional land, even though it may be leased land.

“(3.) The Burnham Chemical Company was granted a lease on lands at Searles Lake. The Company is composed of 7,000 American citizens. It proceeded with the development of its lease by raising money through the mails. The literature it sent through the mail was based upon [400] facts, and was truthful, and yet the Post Office issued a fraud

(Testimony of George B. Burnham.)

order against the company, in 1925, denying it the use of the mail. Our supply of funds, the life blood of the company, was cut off. The company defended itself in the U. S. District Court, at Carson City, Nevada, and asked for a temporary injunction against the Post Office fraud order. The Court handed down a decision in favor of the Burnham Chemical Co., as it saw no evidence of fraud. It granted the Burnham Chemical Co. a temporary injunction. This Post Office fraud order, of course, made it extremely difficult for the Burnham Chemical Co. to raise any funds thereafter. However, the company did manage to raise sufficient money to build part of its plant and produce borax; and 1,400 tons of 99½% pure borax was produced. But, the very month our production started, in June, 1928, the American Potash & Chemical Corporation and the Pacific Coast Borax Co., both foreign-owned companies, began cutting the price of borax from approximately \$60.00 per ton f.o.b. Searles Lake to about \$18.00 a ton. Our cost of production was \$26.00 per ton, so, when the price fell below \$26.00, we were losing money—and we had to close down our plant. After we stopped our small production the price went up. This further discouragement of the efforts of American citizens to develop the country's natural resources was such that [401] we were unable to pay even the rent on the lease and, therefore, the Department of the Interior cancelled our potash lease.

(Testimony of George B. Burnham.)

“It is a very significant fact that we produced 1,400 tons of 99½% pure borax by solar evaporation methods, and without the use of any fuel oil whatsoever. It is even more significant when it is realized that this was a small capacity plant which made this production and that only one product was made instead of several products. If capital had been available so that other products could have been made at the same time, the cost per ton of borax would have been much less because part of the cost of production would have been distributed over the various chemicals that were produced. Yet, if the Company had not been denied the use of the mails, ample capital would have been available. It is evident that the foreign-owned borax interests realized that if the solar methods of production got an adequate start they could become serious competitors to themselves; it would break the British Monopoly of the potash and borax industry in this country; and so this drastic cut in the price of borax was aimed at us, to drive cheaper methods of production from the field. The new source of borax in the Kramer Borax fields was the excuse of the Borax Trust for cutting the price of borax, but that field had been in production for a year before we started production. [402] Furthermore, after we stopped our small production, the price went up. Our being driven from the field of production was a detriment to the country as a whole, as well as to the 7,000 American citizens which our company is composed of, who were developing these valuable resources. Foreign interests drove us out.

(Testimony of George B. Burnham.)

“Therefore, it is not fair to American citizens to grant further lands to foreign interests who have, through unfair methods of price reduction, driven American enterprise out of the field of endeavor.

“(4.) The American Potash & Chemical Corporation consumes vast quantities of fuel oil to evaporate the brines of Searles Lake. This consumption of fuel oil could be saved if the salts of the Searles Lake were recovered by solar evaporation. We have contended that the chemicals of Searles Lake can be obtained most economically by solar methods, the same as salt is obtained from Sea water around San Francisco Bay, or as potash is obtained from the solar evaporation of the brines of the Dead Sea, in Palestine. Our engineers have concurred in that opinion. Where the sun is used to evaporate the brine, as in San Francisco Bay, the cost of recovering the salt, on a large scale production, is approximately \$3.00 a ton. A similar, though perhaps somewhat higher figure, should apply to the cost of producing potash at the Dead Sea. Although the cost [403] of production of potash at Palestine is not definitely known, it is reasonable to believe that the cost must be in that neighborhood or it would not be possible for the Dead Sea producer to recover its potash and haul it by truck, over hazardous roads, to the shores of the Mediterranean and ship it by boat to the United States, in competition with domestic potash production. It might be said that labor is cheaper in Palestine. But the solar process need not use much labor if machinery is used to harvest the potash.

(Testimony of George B. Burnham.)

“In 1937, about 28,000 tons of potash, produced by solar evaporation, was exported from the Dead Sea in Palestine. So, it is evident from that fact that their cost of potash production by solar evaporation is extremely low.

“The recovery of the chemicals of Searles Lake by solar evaporation would help to conserve the fuel oil supply of the United States and, at the same time, would provide the farmers with potash at a lower cost than what they now pay.

“Therefore, it is not in the interests of conservation to use artificial evaporation of Searles Lake brine with its vast consumption of valuable fuel oil as now practiced by the American Potash & Chemical Co. when cheaper potash can be made by solar evaporation. If the [404] solar evaporation method is cheaper at the Dead Sea it should be cheaper at Searles Lake also.

“We believe that it was the influence of foreign-owned interests in the Halls of Government which was behind all the difficulties of the Burnham Chemical Co. in the development of its potash lease at Searles Lake. The reasons we are led to believe this are as follows:

“Stephen T. Mather was, at one time, Chicago Manager of the Pacific Coast Borax Co., and was Assistant to the Secretary of the Interior from 1915 to 1917, and was a Director of the National Parks Service of the Department of the Interior from May 16, 1917, up until his death, about 1930. (See *Who's Who in America*, 1926.) While he held this

(Testimony of George B. Burnham.)

high Government position, he was also Vice-President of the Sterling Borax Co., which is a subsidiary of the Pacific Coast Borax Co., a foreign-owned enterprise. Stephen T. Mather admits that he was in a measure responsible for the Post Office Fraud Order being issued against the Burnham Chemical Company, in a letter dated October 8, 1926, written to Clarence Whitney, one of the Directors of the Burnham Chemical Co. A copy of his letter is enclosed.

“If Mr. Mather felt that our literature was at fault, or if the Post Office Department felt that way, why did they not ask us to correct our literature? We [405] would have been only too willing to do so, if there was anything wrong. Why ruin the investment of 7,000 American stockholders just because some sentences in the literature, they thought, were incorrect? As a matter of fact, there was no misstatement. Stephen T. Mather, in his letter, does not point out any fraud but his letter does contain certain statements which are not true.

“Mr. Mather admits in his letter that our ‘process may be all right.’ If the process is all right, then the profits are possible. In fact, the very Borax Trust itself endorsed the solar processes. In the Fall of 1919, the Pacific Coast Borax Co., through its subsidiary, the San Bernardino Borax Mining Co., applied for 3,102 acres of land suitable for building solar evaporation ponds at the south end of Searles Lake. (U. S. Land Office file Independence 06109.) Also a pipe line right of way was

(Testimony of George B. Burnham.)

applied for, leading from the 100 acre corner of the crystal body held under patent by the San Bernardino Borax Mining Co. to this proposed reservoir land. It was very evident that the purpose was to drain the brine out of the Government Potash Reserve from their 100 acres of patented land on the corner of the crystal body. It was likewise their plan to recover the potash and other salts by solar evaporation methods on a huge scale. [406]

“This obvious scheme to drain the brine of Searles Lake by pumping from their patented land, and deprive the Government of royalties on their production was protested by Mr. Burnham and the other lessees. In its defense of its application for a patent to this clay land to build ponds to evaporate the brine by solar methods, the San Bernardino Borax Mining Co. stated that ‘the commercial solution of the Searles Lake potash is now believed to lie in the development of a process of solar evaporation. This process requires broad areas of shallow ponds with the necessary pipe line connections.’

“Thus, the Borax Trust put itself on record to show that it realized the great possibilities of solar evaporation and the economies that could be effected. It endorsed the solar evaporation method upon which it had spent a year and a half of experimentation under the direction of Mr. G. B. Burnham.

“Mr. Mather himself admits the process may be all right and the foreign-owned Borax Trust itself endorses the process. And so they were afraid we

(Testimony of George B. Burnham.)

would be a formidable competitor, and Mr. Mather influenced the Post Office to issue a Fraud Order so we would not raise funds. Mr. Mather was a high Government official and also an officer and stockholder in the British-owned Borax Trust.

“Later, because we could not raise funds and pay our rent, the Government cancelled our lease. Now, the other foreign interests want our land which we formerly held under lease.

“A great injustice has been done to the 7,000 American citizens, who are stockholders in the Burnham Chemical Co. and who have invested over \$1,000,000 in the substantial development of the Searles Lake deposits. That injustice should be corrected but it cannot be corrected by giving British interests more land.

“At the time the Carlsbad Potash Leases were issued in New Mexico, I understand foreign interests secured control of six of the seven leases—although it was against the public interest to permit foreign interests to control so much of the Government New Mexico Potash Reserve. I believe there was some protest about it at the time. However, a new company was formed to develop the leases, called the United States Potash Co., and this company is a subsidiary of the Pacific Coast Borax Co., and therefore is still a foreign-controlled company. Soon after the leases were granted and the new company was formed, Mr. Horace M. Albright, Director of the National Parks Service in the Department of the Interior, was made Vice-President

(Testimony of George B. Burnham.)
and General Manager of the United States Potash Company. Mr. Albright resigned [408] from his position in the Department of the Interior on August 10, 1933, and immediately became Vice-President and General Manager of the United States Potash Company—a foreign-owned company. (See *Who's Who in America*, 1938.)

“This incident shows a further connection between foreign-owned interests and Government officials which lead us to believe the foreign-owned interests have more than once used their influence in the Halls of Government to drive out American competition and that they have obtained more and more of the borax and potash of this country, to the detriment of American citizens.

“Surely the Government cannot continue this practice of giving foreign-owned interests more and more of the potash and borax lands of this country by now granting more lands at Searles Lake to foreign-owned interests.

“The American Potash & Chemical Corporation owns about 15% of the Searles Lake surface. The 85% remainder is owned by the Government. In taking anything from the lake, this foreign-owned company is able to drain the Government-owned portion as well as the part it controls. It is making a production of over \$6,000,000 worth of potash, borax and other chemicals every year; and its profits are about \$2,000,000 annually. Therefore, [409] 85% of the \$6,000,000 annual production is being drained away from Government land. In order to

(Testimony of George B. Burnham.)

offset this production and prevent Government brine being drained away, the Government lessees should be producing 85% of the total production that is annually made from the Searles Lake deposits.

“So the Government is considering permitting the American Potash & Chemical Co. to lease the Government lands at Searles Lake in order to prevent the brine from being drained onto patented lands, and thus derive a royalty on production by inducing the company to pump from leased land instead of the company’s patented land.

“Now, if the Government granted leases on the Searles Lake Potash Reserve to the American Potash & Chemical Co., would the corporation be willing to curtail its pumping from its patented land to 15% of the total brine pumped from Searles Lake in order that the brine pumped from leased land would be 85% of the total? In other words, would it be willing to make its production from leased lands, plus the production of the West End Chemical Co. (the one other lessee at Searles Lake) equal to 85% of the total production so that the Government would get a 3% gross royalty on 85% of all the chemicals produced from Searles Lake?

“Let us assume they would be willing to do this; [410] then the Government’s brine would not be drained from the Reserve and the Government would at least get its full share of royalties.

“But royalties are not the only thing the Government should consider. If all the chemicals of

(Testimony of George B. Burnham.)

Searles Lake were recovered and sold at present wholesale prices, they would be worth well over ten billion dollars (\$10,000,000,000.00). It would be a pity indeed to let foreign stockholders derive most of the profits from that much wealth instead of American citizens. The income of American citizens can be taxed to support the Government, but the income of foreign citizens cannot be taxed. The wealth of foreign citizens would be increased, but not the wealth of American citizens, which is far more important.

“So, if the Government permits the American Potash & Chemical Corporation to lease much of the remaining lands at Searles Lake (it would eventually get about \$300,000,000.00 royalty on production from those leased lands but the profits will go to English stockholders. The West End Chemical Co. production is small compared to that of the foreign-owned interest. Therefore, the Government would lose the taxable income about three billion dollars dividends (\$3,000,000,000.00 dividends) that otherwise could go to American citizens. [411] besides the taxable increased wealth to our Nation which this added wealth to American citizens would create; and, at the same time, let British interests build up a huge monopoly.

“Furthermore, the taxable three billion dollars (\$3,000,000,000.00), worth of increased wealth to American citizens is forever taxable. Year after year it can be taxed, but once that wealth leaves this country, it is practically gone forever. Some

(Testimony of George B. Burnham.)

American citizens are 'ill-fed, ill-clothed, and ill-housed.' It does not help that situation to give our national resources to foreigners.

"The solution to the problem is to get American-owned corporations to lease the lands at Searles Lake and to help them with their finances to the end that they can produce more than the foreign-owned interests. In order that they can produce more they must be adequately financed and have a process that is cheaper than that now used by the American Potash & Chemical Corporation.

"Inasmuch as foreign-owned interests are driving out American competition by gradually getting more and more of the potash and borax of this country, it is to the Government's interest to help the American-owned corporations with their finances.

"As for a cheaper process, the solution at [412] Searles Lake lies in solar evaporation methods just as are now being carried on at the Dead Sea in Palestine. Of course, the solar process, as applied to the brines of Searles Lake, is different from that applied to the Dead Sea as they are different types of brines. The Burnham Chemical Co. made 1,400 tons of 99½% pure borax by solar evaporation at a cost of about 1¼¢ per pound. It has also carried out extensive research and large scale experiments in recovering potash, sodium carbonate, sodium sulphate and common salt by solar evaporation methods, with such a degree of success that we are convinced we can make these chemicals cheaper by

(Testimony of George B. Burnham.)

solar evaporation than by artificial evaporation of the brine. In fact, we have spent about \$1,000,000.00 in research, experimentation and development of the deposits at Searles Lake. There is no one in the United States that knows as much about solar evaporation processes at Searles Lake, and their tremendous possibilities for cheap recovery of the chemicals, as we do.

“We have certain equities in the Searles Lake deposit due to the fact that we have invested over \$1,000,000.00 in the development of the deposits. We have no money, but we have 7,000 American citizens in our company. They are people of small financial means. Many are destitute and have no income at all now. Some [413] have spent their savings in the development of Searles Lake. They are the kind of people who need the profits that can be derived from the wealth of Searles Lake.

“A great injustice has been done to these 7,000 American stockholders through the influence of foreign-owned potash and borax interests in the Halls of our Government, and also through their unfair price cutting the very month we started production. Therefore, it is only just that the Government now step to our aid and give us a new lease at Searles Lake; and loan to the Burnham Chemical Co. sufficient money to build up a plant as large, or larger, in capacity than that of the foreign-owned interests. With solar evaporation processes, which we believe are cheaper than artificial evaporation, we should be able to easily compete with the foreign-

(Testimony of George B. Burnham.)

owned potash and borax production, and gradually increase the capacity of our plant.

“Then the Government would protect its resources at Searles Lake which it desires to protect. It would derive the royalties it is entitled to. American citizens would be getting the profits. The three billion dollars (\$3,000,000,000.00) of increased wealth mentioned above would be gradually added to the wealth of American families instead of going to foreigners. That vast wealth can be taxed year after year and forever, for the [414] support and the building up of our Government, but if it is allowed to go to foreigners it is lost forever and can never be taxed thereafter. And lastly, but not least, if the Government would give the Burnham Chemical Co. a lease and financial aid it would prevent a foreign-owned monopoly of potash and borax in the United States, and give the American farmer cheaper potash.

“Therefore, on behalf of the 7,000 American citizens of the Burnham Chemical Co., I pray that you will not grant the American Potash & Chemical Co. leases on potash lands at Searles Lake, or grant leases to any other foreign-owned company. I also ask that you give the Burnham Chemical Co. a lease on lands formerly held by it at Searles Lake, or such other lands as you deem available; and that the Department of the Interior render us as much aid as possible in obtaining a Government loan to develop the lease. The spending of the money, of course will be under the supervision of the Government.

(Testimony of George B. Burnham.)

“It is not my own personal gain that I am thinking about in making these requests. I am willing to make any sacrifices which will aid in getting these requests granted. It is the benefits to the 7,000 American citizens that I am concerned with, and the resulting benefit to the Government. [415]

“Very respectfully,

GEORGE B. BURNHAM.”

Q. Now, Mr. Burnham, did you ever receive a reply to that letter? A. Yes, I did.

Q. When? A. In March, 1940.

Q. Have you got that? A. Yes?

Q. Will you be good enough to let me see it?

A. Yes, here it is.

Mr. Carr (Addressing the Jury): Thank you, ladies and gentlemen, for your patience.

Q. Now, I show you a letter dated March 5, 1940, addressed to yourself and headed “Information”, and signed by Fred W. Johnson, Commissioner. A. Yes.

Q. You received that in due course of mail from this party? A. Yes.

Mr. Carr: Do you want a copy, Mr. Harrison?

Mr. Harrison: Yes, please. If your Honor please, we object on the ground that it is incompetent, irrelevant and immaterial to any issue.

Mr. Carr: It is an acknowledgement of the letter and correspondence in reference to this matter, in reference to [416] the lease and in reference to the price cuts.

(Testimony of George B. Burnham.)

Mr. Harrison: It has no relation to the issue before the Jury, the knowledge of this witness as to a cause of action.

The Court: Let me read it.

Mr. Carr: Yes.

The Court: I don't see how it bears on the matter, Mr. Carr. Do you have some reason for putting it in?

Mr. Carr: May I state the purpose?

The Court: Yes.

Mr. Carr: It states that the American Potash & Chemical Company was legally entitled to the leases in question and that of course would disabuse any belief Mr. Burnham would have had in mind that the American Potash & Chemical Company was acting illegally or improperly in any way.

The Court: Is that the point under which you offer it?

Mr. Carr: Yes.

The Court: That is not what the letter says.

Mr. Carr: As I read it, it does.

The Court: I don't think so.

Mr. Harrison: I don't think so. It is after the period involved.

Mr. Carr: Of course, the law provides, as your Honor knows, that a company that was guilty of monopoly or violation of the Anti-Trust Laws could not receive a lease. [417]

The Court: The Secretary of the Interior was not passing on any Anti-Trust proposition. He was just stating that so far as this application was con-

(Testimony of George B. Burnham.)

cerned that the company had sufficient legal status to qualify them to take a lease. That is all he says.

Mr. Carr: It also shows as a result of that, that that letter disabused any belief, if any existed in Mr. Burnham's mind, that they were monopolizing.

The Court: This is in March of 1940.

Mr. Carr: Yes, but it shows——

The Court: I think it would unduly clutter up the record. The objection will be sustained. You may have it marked for identification.

Mr. Carr: May we insert a copy thereof in lieu of this?

The Court: Certainly.

(The document in question was thereupon marked Plaintiff's Exhibit 3 for Identification.)

Mr. Carr: Now, then, we will go on as fast as we can, your Honor.

The Court: Before you go on, Mr. Carr, we had better take the morning recess.

Ladies and gentlemen of the Jury, please bear in mind the admonition heretofore given to you by the Court.

(Recess.) [418]

Q. Mr. Burnham, you presented, at the request of counsel, a letter dated November 13, 1928, from Mr. Townsend to you; do you recall that?

A. Yes.

Q. In that letter it states: "I am now convinced that proceedings before the Federal Trade Commis-

(Testimony of George B. Burnham.)

sion would result in substantial benefits to those interested in the subject." What was the substantial benefits to which Mr. Townsend had reference?

Mr. Harrison: I suppose that means the witness' understanding.

Mr. Carr: Yes.

The Witness: Substantial benefits in increasing the price of borax.

Q. (By Mr. Carr): In what?

A. Substantial benefits to us resulting in the increased price of borax, that is, the Federal Trade Commission would investigate to see if there was any Antitrust Laws being violated.

Q. That was the main result? A. Yes.

Q. Mr. Townsend also said, "But I make this prediction with one condition annexed, and that is, the observance of the caution as I have recommended both in the memorandum and in this letter." Now, what was that caution that he recommended to you? [419]

A. He did not want us to discuss the matter because he wanted to make an investigation to see whether any Antitrust Laws were being violated. He wanted to get some evidence and information, and he did not want the competitors to know that we were trying to get any evidence. Furthermore, he did not think we should discuss the matter, talk about the matter on which we had no information yet, did not have any facts.

Q. At that time he told you he would endeavor to secure evidence?

(Testimony of George B. Burnham.)

Mr. Harrison: What is that?

Q. (By Mr. Carr): At that time did he tell you under his cautious warning for you to secure, if you could, further evidence? A. Yes, indeed.

Mr. Harrison: I object to that on the ground it is immaterial.

Mr. Carr: That explains what was meant by the word "caution" in the answer.

Mr. Harrison: I object to that on the ground it is immaterial and leading.

The Court: I will allow it to stand.

Q. (By Mr. Carr): At that time was the Pittman resolution pending before Congress?

A. No.

Q. When did that Pittman resolution come in?

A. That was passed by Congress in 1936.

Q. This was 1928? A. Yes.

Mr. Carr: Was the letter to Mr. Zabriskie of January 15, 1929, Defendants' Exhibit O, read?

Mr. Harrison: I read part of it.

Mr. Carr: May we see Defendants' Exhibit O? This was the letter, ladies and gentlemen, dated January 15, 1929.

Mr. Harrison: Mr. Carr, before you read that may I look at it a moment, please?

Mr. Carr: Yes, certainly.

Mr. Harrison: I have no particular objection to this letter, if the Court please, but is a letter of four pages and we will object in future if matters immaterial to the dispute are read.

(Testimony of George B. Burnham.)

Mr. Carr: It is your own exhibit. You certainly cannot object to us reading your own exhibit.

Mr. Harrison: It has nothing to do with the question which is the only question before this jury——

Mr. Carr: Then why did you put it in?

Mr. Harrison (Continuing): ——as to whether this plaintiff corporation knew or had cause to believe at this time whether or not the Antitrust Laws had been violated to their damage. We submit a lot of time can be wasted in this respect.

The Court: Mr. Harrison, the letter is an exhibit, and [421] if counsel wants to read it, I am not going to cut him off from doing that. He has to decide whether it is of any importance to his own case.

Mr. Carr: And believe me I won't read anything that I do not think is important.

“January 15, 1929.

“Pacific Coast Borax Company,
100 William Street,
New York City, N. Y.

Attention Mr. C. B. Zabriskie

Dear Sirs:

Pursuant to our conversation last month concerning our patent situation at Searles Lake, I have discussed the matter with our directors, and sub-

(Testimony of George B. Burnham.)

mit to you the following statement of our position concerning the matter:

1. For a long time we received information to the effect that our patent rights, as to borax, were being violated by the operations of the American Potash and Chemical Corporation. After a careful investigation and consideration of the matter, we became convinced that the American Potash and Chemical Corporation was, and for a long time had been, engaged in flagrant violations of such patent rights; whereupon, we served upon them a formal notice of infringement on October 31, 1927.

2. In the meantime, the American Potash and Chemical Corporation has engaged in the persistent and flagrant [422] price-war, as to borax, reducing the price to \$50.00 per ton or less, delivered anywhere in the United States. We are reliably informed that the prices quoted by this company in the present month and for several months last past, are below its actual cost of producing borax, if such production-cost be accurately and properly computed; and we are further reliably informed that the specific purpose of this price-war is to destroy competition as to borax.

3. The American Potash and Chemical Corporation could not carry on this price-war except for the fact that they are illegally employing the economical advantages of the patent rights of the Burnham Chemical Company. In other words: They are illegally using the patent rights of the Burnham Chemical Company for the specific purpose of manufacturing borax at a low cost, and then selling

(Testimony of George B. Burnham.)

minimum annual payment to be made to us for license as above provided, should be increased to \$200,000; [427]

3. The Burnham Chemical Company to definitely obligate itself not to license the processes or any of them to anyone else,—also to defend such processes against all infringers, the expenses of any and all such suits to be borne by the Burnham Chemical Company.

4. In the event that the Burnham Chemical Company should lose its suit against the American Potash and Chemical Corporation, or that in such suit or in any other proceeding the patents and patent rights of the Burnham Chemical Company should be held to be invalid, then the Pacific Coast Borax Company to have the right to cancel the above mentioned agreement for license; provided, however, that any payments theretofore made shall be retained by the Burnham Chemical Company.

5. It being understood, of course, that Pacific Coast Borax Company shall not have the right to sub-license such patent rights, or any thereof, without the consent of the Burnham Chemical Company.

We have refrained from any attempt to set forth the many favorable arguments which should appeal to you and your company, for the obvious reason, above stated, that even our conception of them would appear small to you and your company.

However, I will venture the prediction that the very institution of a suit by us, as above proposed, will result [428] in an immediate increase in the

(Testimony of George B. Burnham.)

price of borax of not less than \$10.00 per ton, and that this increase alone will much more than offset the cost to your company of such benefits, under the above propositions. Should you desire to have any demonstration concerning our patents, or concerning the alleged infringement thereof, we will be glad to extend to you every possible assistance in the matter; if you desire, we will be glad to co-operate with your patent attorney, and furnish him such information as he may desire.

The foregoing proposition has been prepared after a great deal of thought upon the subject. It is hoped that it may appeal to you as a fair and desirable method of co-operation between our two companies.

Yours very truly,

BURNHAM CHEMICAL
COMPANY,

G. B. BURNHAM,
President."

Ladies and gentlemen, I ask you that you note particularly the date, January 15, 1929, and that the letter is written to Pacific Coast Borax Company.

Q. Mr. Burnham, did you have a reply to that letter?

A. I could not find a reply in our file, but I talked to Mr. Zabriskie.

Q. Concerning the letter?

A. Concerning the letter, about two and a half months after [429] January 15th.

(Testimony of George B. Burnham.)

Q. And where did you talk to him?

A. In New York City.

Q. And what was that conversation?

Mr. Harrison: Can you fix that any more accurately?

The Witness: On or about March, 27, 1929.

Mr. Harrison: Can you fix the time any more accurately?

The Witness: A. On or about March 27, 1929.

Q. (By Mr. Carr): Have you any memorandum of that conversation?

A. I have a very brief memorandum which recalled to me the conversation.

Q. When did you discover that memorandum in your book?

A. I just discovered it recently after I had made my deposition, just two or three days before this trial started to discovered this memorandum.

Q. Now, will you refer to that memorandum, please, and read it?

A. At the top of it it is dated "March 27, 1929," and it is the preliminary draft of the telegram to the Burnham Chemical Company from myself in New York City. And at the end of the telegram I add these words—

Mr. Harrison: May I see that before you read it, Mr. Burnham?

Mr. Carr: Yes.

The Witness: Yes.

Mr. Harrison: Show me where it is.

A. Right there.

(Testimony of George B. Burnham.)

Q. (By Mr. Carr): Did you mark that, Mr. Burnham? A. It is not marked, no.

Q. I thought you just marked it. Oh, you did it with your finger? [430]

A. Yes, just pointing.

Q. All right.

A. At the end of the telegram it says "Zabriskie not yet heard from London in answer our letter because Baker sick."

Q. Well, what was your full conversation with Mr. Zabriskie at that time?

A. Well, I was a little provoked——

The Court: He just wants you to tell the conversation.

A. Oh, yes, the conversation: Zabriskie and I talked again about the patent situation and that letter of January 15. Mr. Zabriskie said that they had a lot of patents of their own. He said the Solvay Process Company had some patents and the Solvay process Company was associated with them. And it might be to their better interest to bring a patent suit against the American Potash & Chemical Company, themselves. However, he had to wait until he heard from Baker on the matter.

Q. (By Mr. Carr): And that was all, practically, the substance of the conversation, is that correct, at that time?

A. Yes, as near as I can remember; but this memorandum recalled that visit I had with Mr. Zabriskie.

(Testimony of George B. Burnham.)

Mr. Carr: Withdraw that question. [435]

Q. After your conversation with Mr. Zabriskie, what, if anything, happened as to your thoughts on the situation?

A. Well, I was satisfied that Zabriskie was not cooperating with the American Potash & Chemical Company. They were really thinking about bringing a suit, themselves, against the American Potash & Chemical.

Q. Mr. Burnham, please refer to your diary there of the record of your conversation with Mr. Emlaw on May 17, 1929: Have you got that?

A. Yes.

Q. Will you explain to the jury how it is that note is not all on one page?

A. These notes are not necessarily put down the very day I have a conversation; perhaps the next day or some other time, a couple of days later, when I have the time or the opportunity. After I had put Mr. Zabriskie's conversation down and after I put the conversation with Mr. Emlaw on the other page down I left—I was reviewing Mr. Zabriskie's discussion, possibly the second day, and I recall that he said that "Trona was not selling borax." I mean, "Trona has to sell. Can't help it." I thought that coincided so much with what Emlaw had said that I wrote right across from that on the other page the statement which Mr. Emlaw said, "Emlaw says not selling. Nothing in it. Would sell if he could get an offer."

Q. In other words, you had a vacant space on

(Testimony of George B. Burnham.)

the preceding page [436] and you used that instead of turning the page over, is that correct?

A. That is correct.

Mr. Harrison: I would like to have the witness testify, Mr. Carr.

Mr. Carr: I am asking him if that is the fact.

Q. Will you explain why you did not follow immediately after your note as to the Emlaw entry?

A. Because I didn't put down all the notes I had with Emlaw at that time when I wrote it down. Later on, perhaps the next day, I was thinking of further conversation with Emlaw and I happened to have this page down, so I put this further conversation down on this page that was available.

Q. When that additional thought occurred to you was there any space on the same page?

A. Yes, there was room.

Q. I mean, right below the Emlaw notes.

A. Yes, there was room below. I could have put it there if I thought to turn the page over.

Q. But you went over to the other page to fill in what blank was there, is that correct?

A. I wrote on the other page because that was right opposite that talk with Zabriskie on that subject.

Mr. Carr: Shall I go ahead with a new subject, your Honor? [437]

The Court: Perhaps we might take the recess now.

Ladies and gentlemen of the jury, you are excused until two o'clock, when we will resume the trial of

the case. Please remember the admonition heretofore given to you by the court.

(A recess was taken until two o'clock p.m.)

Afternoon Session, Wednesday, April 2, 1947, 2 p.m.

GEORGE B. BURNHAM

recalled.

Redirect Examination

(Resumed)

By Mr. Carr:

Q. Mr. Burnham, in the Fraud Order case up there in Nevada, the testimony has referred to a temporary injunction that was issued, is that correct? A. Yes.

Mr. Carr: We offer in evidence, if your Honor please, the certified copy of the temporary injunction.

(The document was marked Plaintiff's Exhibit 4 in evidence.)

Mr. Carr: I will read this, if your Honor please:

“In the District Court of the United States
For the District of Nevada

Burnham Chemical Company, George B. Burnham, and V. E. Scott, Plaintiff, vs. George F. Smith, Postmaster of the United States in charge of the Post Office at Reno, Nevada. c

Temporary Injunction

“The above-entitled matter having duly come on to be heard before the above-named court,

(Testimony of George B. Burnham.)

on January 15, 16, and 17, 1930, upon plaintiffs' motion for a temporary [438] injunction, plaintiffs appearing by their attorneys, B. D. Townsend and E. F. Lunsford, and defendant appearing by H. H. Atkinson, United States Attorney;

"And said matter having been argued on behalf of the parties, respectively, and having been duly submitted to the court;

"And the court having duly considered such arguments, together with all papers, records, and files in such cause, including all papers urged in support of or against such motion;

"And the court being duly and fully advised in the premises, and due cause appearing therefor;

"Now, Therefore:

"It Is Hereby Ordered, Adjudged, And Decreed, that during the pendency of this action, or until the further order of this court, the defendant be, and hereby is, enjoined and restrained from, in any manner, obeying or enforcing that certain Post Office Fraud Order (or any part thereof), issued by the Postmaster General of the United States against the 'Burnham Chemical Company and G. B. Burnham, President,' (the later being George B. Burnham, the plaintiff herein), bearing date June 20, 1925, addressed to the Postmaster at Reno, Nevada, and being identified as 'Order No.

(Testimony of George B. Burnham.)

the borax at such a low price as to drive out competitors, including the Burnham Chemical Company, which is the owner of the patent rights illegally employed for that purpose. We are advised by our attorneys that, under these facts, the American Potash and Chemical Corporation is engaged in an "unfair method of competition", within the provisions of the Federal Trade Commission Act, and allied acts.

4. There are two obvious remedies available to us: (a) proceedings before the Federal Trade Commission, and (b) private suit by the Burnham Chemical Company. The former [423] will be conducted by the government, and with little or no control by the complainant or any of the other parties interested; and there is danger that there would be considerable delay, in view of the experience in prior cases before the Federal Trade Commission. Moreover, the Burnham Chemical Company would have no opportunity to enforce its patent rights in any proceedings before the Federal Trade Commission. Therefore, we are advised that we will secure quicker and more complete relief in a private suit by our company, than by any proceeding before the Federal Trade Commission.

5. A victory by our company will inure to the benefit of all parties engaged in the manufacture and sale of borax. In fact, so far as the immediate effects are concerned, the other parties engaged in the borax trade will be benefitted much more than our company, for the reason that the amount of their trade is many times greater than ours. More-

(Testimony of George B. Burnham.)

over, these same parties are deeply interested in any litigation of this kind instituted by the Burnham Chemical Company, for the reason that such suit appears to be the only practical method of stopping this unfair and illegal price-war. Thus, there appear to be moral reasons, although no legal reasons, why those interested in the borax trade should extend to the Burnham Chemical Company financial backing in proportion to the benefits [424] which it will receive, for use in conducting any such legal fight; and, in consideration thereof, that the Burnham Chemical Company should assume such obligations as would guarantee the realization of such benefits.

6. The Burnham Chemical Company has a very limited financial backing and has not yet participated to any great extent in the borax trade. The others engaged in the borax trade and particularly the Pacific Coast Borax Company have ample financial backing and have participated and are now participating to a very large extent in the borax trade. At the same time, the Pacific Coast Borax Company will share in the benefits of any victory which may be won by the Burnham Chemical Company, a great many times more than the Burnham Chemical Company itself, computed upon the basis of their present production respectively. The officers of the Pacific Coast Borax Company will appreciate this even better than anyone else; but, in view of the present production of the Pacific Coast Borax Company, if the present price-war should

(Testimony of George B. Burnham.)

cease, and a normal price for borax should be resumed, the benefits accruing to the Pacific Coast Borax Company would undoubtedly be several million dollars per year.

A consideration of the foregoing situation prompted my informal discussion of the subject with you last month. Further discussion with our directors since my return, [425] has developed the following suggestions which are submitted for your consideration:

1. The Pacific Coast Borax Company to pay to Burnham Chemical Company the sum of \$50,000.00 to be used by it in prosecuting the litigation hereinafter mentioned.

2. The Burnham Chemical Company to institute appropriate suit or suits against the American Potash and Chemical Corporation to enforce its patent rights, and enjoin further infringement by the American Potash and Chemical Corporation, and for such other relief as may be available to the Burnham Chemical Company; it being understood that all financial and other direct benefits shall accrue to the Burnham Chemical Company.

The foregoing suggestion is complete in itself. However, it may be subjected to the following objection: It may be feared that even if the Burnham Chemical Company should be successful in its suit against the American Potash and Chemical Corporation, it might enter into some form of a compromise, which would include the licensing of the American Potash and Chemical Corporation to use

(Testimony of George B. Burnham.)

such patent rights, in which event no benefits would accrue to the Pacific Coast Borax Company or others similarly situated; on the contrary, the American Potash and Chemical Corporation would be put in a position to maintain its prior conduct if it so desired, as licensee [426] of such patents.

Heretofore the Burnham Chemical Company has maintained a definite policy not to sell or otherwise dispose of any of its patent rights. However, the present situation is of vital importance to all of us, and we are willing to do anything reasonable to bring about co-operative efforts to secure mutual relief. Therefore, we submit to you the following further suggestion:

1. The Burnham Chemical Company to license to you (and no one else) the use of its borax process covered by U. S. Patents No. 1,328,614, No. 1,370,278, No. 1,424,447, No. 1,476,890, No. 1,487,046 and No. 1,571,002 (being all of our patents pertaining to borax) for the sum of \$100,000.00 per year payable in advance, together with a royalty of \$3.00 per ton on all borax which you may produce through the use of the processes covered by such inventions.

(The use of these processes would be indispensable to you, in our opinion, if you should ever resume operations at Borosolvay.)

2. In the event that we should be successful in our suit against the American Potash and Chemical Corporation, or in any other suit whereby we should definitely establish the validity of our patents, the

(Testimony of George B. Burnham.)

Q. Now, to clean up this matter about the memorandum: When you were requested to look through your book at the time of the taking of your deposition did you hunt for all of these memos of conversation with Mr. Zabriskie?

A. Yes, I had a great many books, and I hunted through them [431] for all conversations with Zabriskie, but this one was overlooked.

Q. And the only entry or reference to that particular matter is at the end of the note, is it not?

A. Yes.

Q. And there is no heading at the top that it was a conversation with Zabriskie?

A. There was nothing to indicate at a quick glance to indicate that it was a conversation with Zabriskie.

Q. And so, as I understand it, it was two or three days before this trial when you were going through your books that you happened to come on that situation, is that correct?

A. Yes, that is it.

Q. Mr. Burnham, did you ever receive—well, I think you have answered that. Now, on the stand here the other day you were asked this question:

“Q. Did the fact that Zabriskie wouldn’t help you, give you an added belief or suspicion that his company was cooperating with the American Potash & Chemical Company to cut prices to drive you out of business?”

(Testimony of George B. Burnham.)

Your answer was:

“A. No, it didn’t.”

Then Mr. Harrison asked you to refer to your deposition in which these questions were asked of you and you gave the following answers: [432]

“Q. I will ask you to turn to the deposition, at page 105, if your will, please—page 105, line 11, and I will ask you if you testified as follows:

Mr. Carr: Page 105, line 11?

Mr. Harrison: Q. Yes, have you that?

A. 105, line 11?

Q. Yes. I will ask you whether you testified at your deposition that was taken within the last month as follows:

‘Q. Then when Mr. Zabriskie refused to advance the money to assist you in bringing a patent suit against the American Potash & Chemical Company so that you could get the price up, you attached significance to that, did you?’

Mr. Carr: What page and what line?

Mr. Harrison: Line 11.

Mr. Carr: Oh, pardon me.

Mr. Harrison: I will re-read the question:

‘Q. Then, when Mr. Zabriskie refused to advance the money to assist you in bringing a patent suit against the American Potash & Chemical Corporation so that you could get the price up, you attached significance to that, did you?’

(Testimony of George B. Burnham.)

A. Well, I felt very certain that the American Potash was infringing our patents and the very fact that Zabriskie, who wouldn't cooperate in any way to help us, and incidentally [433] helped himself for supporting our infringement suit against the American Potash & Chemical Company, the very fact that he wouldn't cooperate gave me added belief or suspicion that he was cooperating with the American Potash & Chemical Company and cooperating with them to cut the price in order to drive us out of business.'

Q. Did you so testify?

A. I did, but I have been thinking about that since I testified to that and I have been wondering a little bit."

Now, Mr. Burnham, can you explain the apparent inconsistency of those two answers.

A. In my deposition when I was asked that I was thinking of the period of time shortly following the letter we wrote on January 15. For two and a half months there we hadn't heard from Zabriskie, and I was a little provoked and a little bit suspicious that maybe he was cooperating with the American Potash and Chemical Company, but when that similar question was asked me here on the stand the other day I was thinking of that period of time after my talk with Zabriskie on March 27, 1929, and my talk with Zabriskie also on May 17, 1929, and this picture existed then in that earlier period of time.

(Testimony of George B. Burnham.)

Q. So that in the period of time you referred to in your deposition, that was immediately after, or shortly after you had written this letter to Pacific Coast Borax Company, is that correct?

A. Yes. [434]

Q. And before you had your conversation with Mr. Zabriskie which you just mentioned, and as to which you read a memorandum from your book.

A. Yes. When I was on the witness stand I was thinking of that period of time just after I had that other conversation with Mr. Zabriskie in March of 1929.

The Court: Mr. Carr, I will interrupt the proceedings for a moment. I want to take the report of the grand jury.

Mr. Carr: Certainly, your Honor.

(Recess.)

Mr. Carr: Shall I proceed?

The Court: Yes.

Q. (By Mr. Carr): Mr. Burnham, after your conversation with Mr. Zabriskie in March, were any suspicions you might have had as to the good faith of the Pacific Coast Borax Company then allayed?

Mr. Harrison: I object to that question, if your Honor please——

The Court: I did not hear the question. Will you read that, please?

(Question read.)

Mr. Harrison: I object to that; it is leading.

The Court: Yes, it is leading. You can ask him what happened.

(Testimony of George B. Burnham.)

3006'; and from in any manner refusing or failing to deliver properly all letters and other [439] mail matter (and each and every part thereof) addressed to the Burnham Chemical Company and 'G. B. Burnham, President' and George B. Burnham, plaintiff herein (and being the 'G. B. Burnham, President' mentioned in such fraud order) or failing to pay each and all postal money orders in terms payable to the Burnham Chemical Company, or to 'G. B. Burnham, President,' or to George B. Burnham, plaintiff herein, (and being the 'G. B. Burnham, President' mentioned in such fraud order); and from, in any manner, denying or interfering with the full enjoyment by the Burnham Chemical Company and 'G. B. Burnham, President,' and George B. Burnham, Plaintiff herein, (and being the 'G. B. Burnham, President' mentioned in such fraud order), and each of them, of each and all general postal rights and privileges provided by the General Postal Laws of the United States.

Dated: Carson City, Nevada, February 3, 1930.

/s/ FRANK H. NORCROSS,
District Judge."

Q. (By Mr. Carr): Now, Mr. Burnham, how long did that temporary restraining order remain in force and effect?

A. It remained in force and effect until 1935. We continued to get our mail.

(Testimony of George B. Burnham.)

Q. Then what happened, if anything?

A. Then the case was dismissed by the court for lack of prosecution on our part because we had planned to make the temporary [440] injunction permanent, but because of the sickness of Mr. Townsend that was never accomplished, and therefore, for lack of prosecution on our part, the case was dismissed by the court.

Q. Did you have any notice of such intention to dismiss that case?

A. No, I did not.

Mr. Harrison: I object to that on the ground it is incompetent, irrelevant, and immaterial, if the Court please.

Mr. Carr: It is the history of the case. It is proper. It is a history of the whole situation.

Mr. Harrison: It does not bear on the issue of knowledge.

The Court: I don't see what notice has to do with it. I will sustain the objection.

Mr. Carr: It shows they did not voluntarily consent to it. Afterwards the Postoffice order was reinstated, and we want to show the time that elapsed between the two.

Mr. Harrison: The testimony already shows it was dismissed for lack of prosecution.

The Court: Yes.

Q. (By Mr. Carr): I believe the fraud order was thereafter reinstated, was it not?

A. Not until two years later.

Q. Your answer is "Yes" to that?

A. Yes. [441]

(Testimony of George B. Burnham.)

Q. When was it reinstated?

A. Two years later, in September, 1937. We continued to get our mail just the same.

Q. You continued to get your mail just the same after the order was reinstated?

A. No, after the case was dismissed we continued to get our mail just the same.

Q. And the fraud order was reinstated?

A. Yes.

Q. Was there any hearing in the Post Office Department before the reinstatement of that order?

A. No.

Mr. Harrison: That is objected to as incompetent, immaterial and irrelevant. I did not have an opportunity to object before the answer went in.

Mr. Carr: Then I stipulate the answer may go out for the purpose of your objection going in, Mr. Harrison. Now, your Honor, that is a history to show without any knowledge or consent on their part this order, without any notice to them, without giving them a chance——

The Court: We have enough to do in deciding the issue at hand without deciding whether or not the Post Office Fraud Order was a proper order or not.

Mr. Carr: Very well, your Honor.

The Court: I will sustain the objection.

Q. (By Mr. Carr): There has been some testimony, Mr. Burnham, [442] as to the resolution introduced by Senator Pittman in the Senate, is that correct? A. Yes.

(Testimony of George B. Burnham.)

Q. Have you a copy of that resolution?

A. Yes.

Q. Will you produce it, please? While you are producing it, let me ask you, how did you get that? How did you receive that?

A. I received it from either Senator Pittman or his secretary; I don't remember exactly which one.

Q. And when, do you remember?

A. In 1936.

Q. Do you remember what month?

A. It was in the summer of 1936, I believe.

Mr. Carr: We have, may it please your Honor, this resolution, and after counsel has had an opportunity to read it and enjoy it, we will read it.

Mr. Harrison: If your Honor please, we object to this as being immaterial and irrelevant and incompetent, and no foundation laid.

Mr. Carr: It has already been referred to in the cross-examination. You brought that out.

The Court: Of course, I don't know what the relevancy of it is. That would be saying if a man visited this witness the day after Thanksgiving that you would have to enter the [443] Thanksgiving Proclamation. It may be that this is relevant, I don't know. But I must confess after reading it that I don't know what the relevancy of it is.

Mr. Carr: It attempts to bear out the plaintiff's testimony previously given that he knew nothing of these alleged conspiracies or these acts of these defendants, I mean, as to constitute the conspiracy, and he was still endeavoring to get help from the

(Testimony of George B. Burnham.)

Government as to the ascertainment of the answer as to whether or not these defendants were violating the Antitrust Laws.

The Court: The fact that a Senator of the United States introduced a resolution in Congress in 1936 reciting the conditions in the borax industry and providing for the appointment of a committee to investigate them in 1936 would bear how on the relationship of the plaintiff in this case?

Mr. Carr: That goes to substantiate his testimony that he knew nothing about any such conspiracy in existence and that the letters back and forth between him and Senator Pittman show that Mr. Burnham *was* submitted to the Government all of the facts of his situation as he knew them to be.

The Court: I don't want to suggest to you, Mr. Carr, how you should try your case, but if you insist on urging this resolution, that it be introduced in evidence, I will overrule the defendants' objection, but how it serves your cause beneficially I cannot possibly see. If you say that the plaintiff [444] is the one who urged that this resolution be presented in the Senate of the United States, how it serves your cause I don't know, but I am not going to stop you from putting in anything you want.

Mr. Carr: It goes to the intent of the plaintiff and his endeavor to prove the facts.

The Court: It would certainly be more affirmative proof of knowledge than absence of knowledge.

(Testimony of George B. Burnham.)

Mr. Carr: He is trying to find out the facts and why he didn't know them in his letter——

The Court: If you insist on this resolution going in in spite of what the court has said I will admit it.

Mr. Carr: Thank you, your Honor; and without intending to be bullheaded, frankly, I think it would fit into our theory.

Mr. Harrison: Is it your claim that this witness instigated this resolution?

Mr. Carr: No, he is not a Congressman, but in his letter to the Department of Justice——

The Court: As I remember his letters did indicate he was urging a resolution be made.

Mr. Carr: Yes.

The Court: Now, you want to introduce the resolution authorizing the investigation?

Mr. Carr: Yes, but we don't contend that Mr. Burnham brought that about. We don't know. His inquiries may have [445] helped, but we cannot say he was actually the one who persuaded Senator Pittman to introduce that resolution.

The Court: Very well.

(The resolution was received in evidence and marked Plaintiff's Exhibit 5.)

The Court: Do you wish to read the whole resolution, or can you not state the substance of it to the jury?

Mr. Carr: Yes, that is simply a resolution introduced, ladies and gentlemen, by which a committee was appointed to investigate, and I will read the

(Testimony of George B. Burnham.)

last portion of it. There is a long preamble to the resolution. (Addressing Mr. Harrison): You can read over my shoulder.

Mr. Harrison: Yes, and that will save a little time.

Mr. Carr (Reading):

“Whereas dependence on foreign sources for an adequate supply of potash was brought forcibly to our attention when, in May, 1910, a potash law was enacted in Germany which required the American consumer to pay \$32.98—” and so forth, and

“Whereas since 1910 the Congress has appropriated in excess of \$3,000,000 to find and develop domestic sources of potash and methods for the extraction and use thereof; and:

“Whereas two domestic sources have been developed, namely, the brines of Searles Lake, San Bernardino County, [446] California, and the deep mines near Carlsbad—” and so forth, and:

“Whereas notwithstanding the withdrawal of the Searles Lake area in 1913, and the establishment of a leasing policy thereon by the Potash Act of 1917, a foreign-owned company received patents in 1918, 1919, and 1920 covering placer claims—” and so forth, and:

“Whereas, following development of additional sources of potash in Spain—” and so forth, and:

(Testimony of George B. Burnham.)

“Whereas it appears imperative to adopt some wise policy of conservation of natural mineral resources to minimize over-production and attendant waste—” and so forth,

“Therefore Be It

“Resolved, That the Committee on Public Lands and Surveys be, and it is hereby, authorized and directed to institute and conduct a thorough investigation of all phases of the subject-matter hereof.

“For the purposes of this resolution the said committee, or any subcommittee thereof, is authorized to hold hearings; to sit and act at such times and places during the sessions and recesses of the Congress until the final report is submitted; to require by subpoena or otherwise the attendance of such witnesses, and the production of such books, papers and documents; to administer such oaths; to [447] take such testimony; and to make such expenditures as it deems advisable.”

And then:

“The Committee shall report at the next Session of Congress the results of its investigation, together with its recommendations, if any, for necessary legislation.”

Q. Now, Mr. Burnham, that was introduced in April, 1936? A. Yes.

Q. And you had, did you not, communications from Senator Pittman in reference to the investigation they were making? A. Yes.

(Testimony of George B. Burnham.)

Q. Over what period of years did those investigations exist or continue?

A. About four years.

Q. Senator Pittman finally died in what year?

A. Senator Pittman finally died in November of 1940.

Q. Had the investigation been concluded at that time? A. No, it had not.

Q. Do you know what became of the investigation?

Mr. Harrison: I object to that as immaterial.

Mr. Carr: All right, we withdraw that question.

Did you read that letter to Senator Pittman, Mr. Harrison?

Mr. Harrison: I read parts of it, Mr. Carr.

Mr. Carr: May I see Defendants' Exhibit T? I will try, [448] ladies and gentlemen of the jury, not to burden you with this if I find it only contains a brief statement.

The Court: This is the reply of Mr. Burnham to Senator Pittman's letter?

Mr. Carr: Yes, request, your Honor. May I look at this a moment to see? Maybe I can avoid some of this that has been read.

Q. Briefly, Senator Pittman asked you to write a full statement of the situation concerning the Burnham Chemical Company, did he?

A. Yes.

Q. And you did that in your letter of October 20, 1936? A. Yes.

(Testimony of George B. Burnham.)

Q. In that letter you practically set forth for all purposes here today the same contents that were in the letter that you wrote to the Secretary of the Interior?

A. Very much the same. It was the history of the Burnham Chemical Company.

Q. Now, was there anything definitely done, do you know, under that to carry on such investigation under that resolution?

Mr. Harrison: Objected to on the ground it is wholly immaterial what the committee did.

Q. (By Mr. Carr): Do you know, Mr. Burnham, how far the investigation under that particular resolution had proceeded at the time of Senator Pittman's death? [449]

Mr. Harrison: That is objected to as immaterial.

The Court: I think that calls for the opinion of the witness, too.

Mr. Carr: But the letter will be in for all purposes, will it not?

Mr. Harrison: The letter has been introduced in evidence.

Q. (By Mr. Carr): Mr. Burnham, have you a copy of the letter to the Stockholders, of September 24, 1935? A. Yes.

Q. May I see that, please? A. Yes.

Q. Now, you handed me, Mr. Burnham, a letter directed to the stockholders of the Burnham Chemical Company, one of those printed letters dated September 24, 1935, is that correct? A. Yes.

Q. And with a facsimile of your signature?

A. That is right.

(Testimony of George B. Burnham.)

Mr. Harrison: We object to it, if your Honor please. This is offered, Mr. Carr tells me, for the purpose of a particular statement here, and to that statement we object on the ground it is self-serving and not admissible.

The Court: Is it marked?

Mr. Carr: Yes, your Honor, and it is simply in substantiation of his testimony as to his belief after his conversaton with Mr. Zabriskie.

Mr. Harrison: We respectfully submit that a belief cannot be proved, if your Honor please, by a statement to a third person at the time. The ultimate question is what he knew and what he told us.

Mr. Carr: That is exactly what he believed. That is exactly what this does. It shows what he believed in 1936.

Mr. Harrison: We submit his statement to a third person as to what he believed at that time is not a competent proof of his belief.

The Court: I think the rule is very clear, Mr. Carr, that counsel can on cross-examination, bring out any statement [450] that a party may have made, but the party on whom rests the burden of going forward cannot produce self-serving declarations to prove his case.

Mr. Carr: That is true as a general rule, but this was written long prior to this litigation, and was written some years after.

The Court: If you wanted to use it perhaps as a memorandum to refresh the witness' recollection as to something he did at the time, I do not know

(Testimony of George B. Burnham.)

whether that would be possible to cover it; but the statement itself is not admissible and I would have to sustain an objection to it on that ground.

Q. (By Mr. Carr): Mr. Burnham, along about September 24, 1935, did you make any statement to your stockholders about the reasons for the drastic price cuts in borax?

Mr. Harrison: That is objected to as immaterial and calling for hearsay testimony.

Mr. Carr: No, that is not hearsay; that is a direct statement along his Honor's suggestion.

The Court: All I said, Mr. Carr, was it may be that some document that the witness himself made up might refresh his recollection as to something that he did at the time.

Mr. Carr: I won't even refer to this document.

Q. Mr. Burnham, how long, may I ask, did you continue to believe the statements made to you by Mr. Zabriskie and Mr. Emlaw as to the reason of the price cut in 1928? [451]

Mr. Harrison: That is objected to on the ground it has already been covered on direct.

Mr. Carr: No, excuse me, on direct, no.

Mr. Harrison: That precise question.

Mr. Carr: Oh, no, we never went into those price cuts on direct. You brought it out on cross-examination.

The Court: He said in his direct examination that during the entire period specified in the order covering the special issue in this case he had no knowledge or reason to believe his business had been damaged.

(Testimony of George B. Burnham.)

Mr. Harrison: Also I think he testified on direct in answer to Mr. Carr's question that he believed the statements of these gentlemen all through the period.

Mr. Carr: I asked him how long did he continue to believe them.

The Court: If the objection is merely on the ground that he has answered it once before, in order that there may be no question about it, I will overrule the objection.

The Witness: A. I believed it until September, 1944, when the——

Mr. Harrison: Never mind, if you will excuse me, if your Honor please.

The Court: Yes, I think that is the same statement the witness made before. The same objection was made then.

Q. (By Mr. Carr): Now, Mr. Burnham, I am going to read you [452] some portions of your complaint on file herein, beginning at Page 25, Line 25, headed, "The 1929 Agreement".

Mr. Harrison: If your Honor please, we object to reading the complaint now on the same ground on which we objected to it at the opening of the trial. This allegation to which Counsel now refers goes to the merits of the case and not to the knowledge of the plaintiff.

Mr. Carr: Why, yes, it goes to the merits of the case exactly, and that is the basis on which this complaint is brought. The complaint is not brought, if it please your Honor, for conspiracies involving

(Testimony of George B. Burnham.)

the overt acts; all the testimony we have had to date has been involving conspiracies around the overt acts. Now, there has been no testimony whatsoever with respect to the basic conspiracy on which this action is filed and commenced. There is nothing in the complaint as to anything involving the overt acts testified to this morning except previously——

The Court: I am very much in the dark as to what sort of question you are going to put to the witness. It is very difficult for me to rule on a question when I do not know what you are going to ask.

Mr. Carr: Independent of that, your Honor, we have a right to read the portions of the complaint on file herein, we submit.

The Court: That is not part of the interrogation of the [453] witness, unless you are going to ask him some questions.

Mr. Carr: I am going to ask him question on that.

The Court: What is the question you are going to ask?

Mr. Carr: I am going to ask him, When did he first discover or know about that 1929 agreement. That is the basis of our action here.

The Court: You mean you want to ask the witness when he first discovered that there was a conspiracy between the defendants which resulted in injury to his business?

Mr. Carr: Yes.

(Testimony of George B. Burnham.)

The Court: You have already asked him that and he said he did not discover it until 1944.

Mr. Carr: No, your Honor, I want to ask him specifically all of the questions I asked him before. These were the questions, and they were right along the line of your Honor's pre-trial order and did not involve this situation. The questions that I asked Mr. Burnham——

The Court: No, I am not talking about what is in the transcript. I am talking about the question you asked him a moment or two ago, and he answered the first time he had any knowledge of this conspiracy was in September, 1944.

Mr. Carr: No, I asked him for how long did he continue to believe Zabriskie.

The Court: Oh, I see.

Mr. Harrison: He also testified on direct as to when he [454] first learned about the alleged conspiracy.

The Court: Why don't you ask him, if there is any doubt about it, Mr. Carr, without reading the allegations of the complaint, when he first obtained any knowledge of the conspiracy which he charges in the complaint here? That covers what you want without reading the complaint.

Mr. Carr: I would like, your Honor, to read the complaint, the conspiracy charged in the complaint, because that is the basis of our action, not these overt acts to which all of the testimony has tended.

The Court: Would you permit me to ask a question and see if it will cover what you have in mind?

Mr. Carr: Yes.

(Testimony of George B. Burnham.)

The Court: I understand that you have charged in the complaint in this case that the defendants in 1929 entered into a conspiracy and that the result of that was the plaintiff was driven out of business. Now, what you want to know of this witness is when did this witness first discover the existence of such a conspiracy, is that right?

Mr. Carr: Yes, your Honor.

The Court: All right. I will ask him that question. Do you wish to object to that?

Mr. Harrison: Only to this extent, your Honor, that I suggest that the complaint also alleges a conspiracy in 1925 with respect to the Post Office fraud order and in 1928 with [455] respect to the price cut.

Mr. Carr: No, your Honor.

The Court: I will put the question this way and then either counsel may object to it:

Q. When did you first obtain knowledge of any of the conspiracies that you have alleged in the complaint?

Mr. Carr: No, that is different, your Honor, because there are different conspiracies. I want to confine his testimony at this time. Counsel can bring out on cross, if he wants to, that matter.

The Court: All right. I will reframe the question again:

Q. When did you first obtain any knowledge of the so-called 1929 conspiracy which you have described in detail in your complaint?

* Does that cover what you have in mind?

(Testimony of George B. Burnham.)

Mr. Carr: Yes, your Honor.

The Court: Do you wish to object to that?

Mr. Harrison: No, your Honor.

The Witness: A. In the fall of 1944.

Q. (By Mr. Carr): And how did you discover it then? A. When I read——

Mr. Harrison: What is that?

Mr. Carr: Q. How did you discover that?

Mr. Harrison: I object to that as being immaterial, if the Court please. The question is his knowledge and belief [456] from 1929 to 1939.

Mr. Carr: No, your Honor. It deals with how he happened to discover it, and that is pertinent: how he happened to discover it.

The Court: I will hold that that is incompetent, irrelevant and immaterial. I think I have made a previous ruling on that before.

Mr. Carr: I ask permission to read these paragraphs on the 1929 agreement. The Jury has no knowledge of what they are, and yet the complaint sets them forth in full, and we believe, as we have contended all through, that the failure of the defendants to answer these portions of our complaint constitutes an admission for purposes of this proceeding, may it please your Honor, of the allegations therein existing.

The Court: I hold that that is immaterial, Mr. Carr. It could be the most dastardly conspiracy that human ingenuity could devise and it still won't change the question here to be determined, and that is whether the plaintiff had knowledge of it. It

(Testimony of George B. Burnham.)

doesn't make any difference whether it is just a mild conspiracy or a bad one or the worst one we ever heard of. It won't make a bit of difference if you read it to the Jury, because how bad the conspiracy was does not affect the question of whether the plaintiff had knowledge; so I do not see how that helps us. I will adhere to my previous ruling.

Mr. Carr: So that our record may be clear, we ask now, if it please your Honor, for permission to read to the Jury Paragraphs 62, 63, 64, 65, 66, 67 and 68 of the complaint.

Mr. Harrison: To which we object, if your Honor please.

The Court: I will say to you that if we had on the witness stand someone who did not know the contents or the nature of the conspiracy that was charged, so that you would have to identify it with greater particularity, there might be some reason for taking up the time of the Jury and the Court in propounding such a long question, but the man who signed the complaint is on the witness stand. He is fully acquainted, as is evident from his testimony, with everything that is involved in this case and therefore it is unnecessary to go to that length in framing the question. I will sustain the objection.

Mr. Carr: I want to be sure I get in all those paragraphs we would offer here.

Q. Mr. Burnham, have you in mind the allegations of those paragraphs to which I have just referred?

A. Yes.

(Testimony of George B. Burnham.)

Q. Would you like to read yourself those allegations before you reply further without my reading them to the Jury, to refresh your memory?

A. Yes.

Mr. Carr: May I then— [458]

Mr. Harrison: I submit, if the Court please, there is no question before the Jury.

Mr. Carr: I am asking him, in view of the Court's refusal to allow us to read these paragraphs from our own complaint, which is the basis and which forms the basis of our cause of action here, and I number them as I go through, I ask the witness, in order to be absolutely fair with the Court and Jury, when he answers that he have actually in mind the allegations of the complaint.

The Court: The witness has not expressed any doubt that he understood when he answered the Court's question what the allegations of the complaint were. Mr. Burnham understands it. I do not think he would answer the question unless he did.

Mr. Carr: He knows generally.

Q. Mr. Burnham, would you like to read those allegations of the complaint before you answer?

Mr. Harrison: I object to that, if the Court please. Whether he would like to or not is not proper. There is no question before him.

Q. (By Mr. Carr): Do you recall all those allegations within those paragraphs to which I have referred?

A. Oh, in a general way, the main one.

(Testimony of George B. Burnham.)

Q. What do you consider the main one?

A. That was the conspiracy—— [459]

Mr. Harrison: I object to that.

Mr. Carr: Wait a minute.

Mr. Harrison: It would be a question for the Court as to what the main one is and not the witness.

The Court: I sustain the objection.

Mr. Carr: I thought, your Honor, with all due respect, that we at all times, the plaintiff at all times had the right to read to the Jury and to the Court the allegations of his own complaint on which his action is based.

The Court: That might be true in a trial on the merits.

Mr. Carr: This is the same as a trial on the merits so far as the statute is concerned. It is a trial on the statute, and that is exactly the same as a trial on the merits, confined to that question.

The Court: The Court will adhere to the ruling heretofore made.

Mr. Carr: Will you read the Court's question and the answer of the witness?

(The reporter read as follows:)

“Q. When did you first obtain any knowledge of the so-called 1929 conspiracy which you have described in detail in your complaint?”

A. In the fall of 1929.

Q. (By Mr. Carr): 1929?

A. 1944, excuse me. I was thinking of the 1929 agreement. [460]

(Testimony of George B. Burnham.)

Mr. Carr: Mr. Reporter, what was the previous answer of the witness?

(The reporter reading):

“In the fall of 1944.”

Q. (By Mr. Carr): Let me ask you this: At any time prior to the fall of 1944, did you believe that such a conspiracy as alleged in your complaint, known as the 1929 conspiracy, existed?

A. No.

Mr. Harrison: Just a moment, if the Court please, Mr. Carr. If your Honor please, there is another objection to the 1929 conspiracy and I would like to state it for the benefit of the record. The 1929 conspiracy alleged in the complaint had nothing to do with the damage done to the plaintiff in 1928 and 1925. The damage alleged in the complaint is alleged to have resulted from the fraud order in 1925 and the price cut in 1928, and on that ground also we object to the question.

Mr. Carr: But also the fraud order activities of the defendant as alleged in the complaint carried over until long after the 1929 conspiracy; the same had to do with the price cut. The same had to do with the Little Placer. The same had to do with the loss by the plaintiff of his lease on Searles Lake. The complaint, as your Honor knows, alleges that in 1919 this conspiracy was formed. That is the basis of our cause of action here. Our cause of action grows out [461] of that allegation. And then we also allege in the complaint that the 1929 agree-

(Testimony of George B. Burnham.)

ment also picked up prior and subsequent conspiracies and carried them on. Naturally they would carry on the subsequent one, but the damage that resulted to this plaintiff did not accrue until long after 1929. It is true, your Honor, we did not lose our plant or our lease until 1928——

The Witness: 1938.

Mr. Carr: 1938.

The Witness: 1938.

Mr. Carr: Excuse me. I should have said 1938. That you, Mr. Burnham. And during all of that period from 1929 to 1938 defendants were active in pursuance of the activities in reference to the fraud order and to the price cuts and to the Little Placer and to the loss of the lease on Searles Lake, and it was in 1938 that we lost our plant.

Mr. Harrison: If your Honor please, I submit that Counsel's statement involves a total misconception of the question submitted to the Jury and of the rulings of your Honor heretofore made. Those statements can only be confusing.

The Court: The issue submitted to the Jury, the issue that is framed for submission to the Jury covers the knowledge of the plaintiff or cause for belief on the part of the plaintiff during the period from 1929 to 1939.

Mr. Carr: Yes, your Honor, but we did not refer to the [462] 1929 agreement. Now, all the testimony that has gone in here has referred to the conspiracy surrounding the overt acts specially, not to the 1929 agreement. It is not until now that the

(Testimony of George B. Burnham.)

1929 agreement—and there was one reason why we think, with all due respect, your Honor was in error in making that pre-trial order without confining it to the allegations of the complaint.

The Court: If I remember rightly—my memory may be bad—both sides submitted forms to me.

Mr. Carr: We did.

The Court: Covering that precise period of time, you may have objected to the form in which I put the order, but no one, so far as I know, ever objected to the period of time because you submitted a form of question to go to the Jury covering the same period of time.

Mr. Carr: No, your Honor, I think if you will go back and look at our proposed instruction at the time, you will see we did not. With your press of other work here I do not see how you keep everything in your mind as you do. But the basis of our complaint is the 1929 conspiracy. We discussed the matter generally. Your Honor picked May 17 as a starter. We never suggested that to your Honor. Counsel made several suggestions along that line, as I recall, but we never did.

Mr. Harrison: May I suggest to your Honor that the question to be submitted to the Jury relates to the plaintiff's [463] knowledge or cause to believe that it had been theretofore damaged; that is to say, damaged before May 17, 1929.

Mr. Carr: No, your Honor.

Mr. Harrison: I think it is very clear.

Mr. Aitken: That is not the issue at all.

(Testimony of George B. Burnham.)

Mr. Carr: We are standing on the allegations of our complaint, and the allegations of that complaint cannot be escaped by attempting to introduce a lot of evidence as to overt acts. We make no charge of these specific overt acts in the complaint. We do not ask for any damages for those overt acts or the conspiracy surrounding them. We ask for damages growing out of the 1929 conspiracy.

Mr. Harrison: The question to be submitted, settled by your Honor, was whether or not the plaintiff knew or had cause to believe that the damage theretofore suffered by the plaintiff was the result of a violation of the Anti-Trust Laws.

Mr. Carr: Yes, that is the order your Honor made.

Mr. Harrison: And "theretofore suffered" is before this period, and the only damage alleged in the complaint is the damage before this period.

Mr. Carr: No, it is not.

Mr. Harrison: If your Honor will refer to the language of the question I think it will be entirely clear.

The Court: I recall. I do not think I have the file that has the briefs. [464]

Mr. Carr: I am sure your Honor will see—

The Court: There was a number of letters. I know, that I received from both sides in connection with this matter.

Mr. Carr: Yes, but we made no such suggestions. We wanted your Honor to give much fuller instructions and your Honor evidently picked

(Testimony of George B. Burnham.)

neither of us—I know we did not request you to fix the date of May 17. We did not ask you to do that. Your Honor evidently picked that because it was the date of the Zabriskie interview.

The Court: Mr. Carr, I have to differ with you on that. I did not fix any dates in the matter at all. Both counsel sent me a number of letters, which the Clerk does not seem to have, and in those letters and briefs these dates were mentioned. Both sides mentioned them.

Mr. Carr: No, your Honor, I do not want to be discourteous.

The Court: What was in dispute was the form of the language to be used in defining the issue.

Mr. Carr: No, your Honor, we could not have because I am certain of that and, as I say, our whole complaint is based upon that 1929 agreement, not on the conspiracy surrounding the overt acts.

The Court: We have gotten into a lengthy argument and away from the question before us. You asked a question and Mr. Harrison objected to it about the 1929 agreement. Will [465] you read the last question and answer?

(The reporter read as follows:)

“Q. Did you believe that such a conspiracy as alleged in your complaint and known as the 1929 conspiracy existed? A. No.”

The Court: Now, have you another question? Let us go on from there. I will allow the answer

(Testimony of George B. Burnham.)

to stand because I do not regard the answer as any different from the answer the witness gave on his direct examination. He is just repeating what he said.

Mr. Carr: But there was no reference in the direct examination, your Honor, to the 1929 conspiracy.

Mr. Harrison: If your Honor considers that the 1929 conspiracy enters into the situation, we would like to be heard, because we understood the question defined for submission to the Jury was about the plaintiff's knowledge of damage caused to him before 1929.

The Court: If this case goes to the Jury I am going to instruct the Jury that the statement of an opinion on the part of the witness is not evidence. The matter has to be determined on the facts, what was said and done, and not what the opinion of the witness is.

Mr. Carr: Yes, but your Honor used the word "belief" in your pre-trial order, and that is why I am asking that. We had to ask him that. [466]

The Court: I put in the pre-trial order whether the plaintiff had knowledge or good cause to believe.

Mr. Carr: He has answered that. Will your Honor pardon me just a moment?

Q. Mr. Burnham, did you ever prior to the fall of 1944 hear of any agreement entered into by the defendants in reference to price cuts or monopolization of the borax industry?

A. Could you state that question again?

(Testimony of George B. Burnham.)

Mr. Harrison: Just a moment, please. I do not understand what the question means unless it is a mere repetition of the previous question.

Mr. Carr: No, it is another thing, another phase. Will you read the question, Mr. Reporter?

(Question read.)

A. Not by these defendants in our case.

Q. (By Mr. Carr): Your answer is, then——

Mr. Harrison: Just a moment. He has given the answer.

Mr. Carr: I did not hear it.

Q. Do you mean that none of the defendants told you or that you had not heard? What do you mean by that?

A. Well, the defendants in our case——

Q. What?

A. The defendants in our case, as I understand it, are the American Potash & Chemical Company, the Pacific Coast Borax Company, the Stirling Borax, the San Bernardino Borax [467] Company, the Borax Consolidated of London — Limited, I mean.

Q. Did what?

A. I never heard of any conspiracy between these people mentioned on our complaint.

Q. Prior to the——

A. Prior to the fall of 1944.

Q. Does that also refer to the 1929 agreement in that complaint?

Mr. Harrison: That is objected to on the ground it is immaterial, if the Court please.

(Testimony of George B. Burnham.)

Mr. Carr: No, it is not.

Mr. Harrison: On the ground that the damage alleged in the complaint occurred before 1929, on the ground that the question to be submitted to the Jury is whether the plaintiff knew or had cause to believe between 1929 and 1939 that it had therefore been damaged, and that therefore any testimony relating to the 1929 agreement or alleged agreement would be immaterial to that question.

Mr. Carr: The whole case is based on the 1929 agreement.

The Court: I will sustain Counsel's objection. I think you are in error, Mr. Carr.

Mr. Carr: Will you bear with us a moment, your Honor? I think that is all.

Mr. Harrison: We may be able to shorten the recross-examination if we could recess for a few moments now.

The Court: We will take the afternoon recess. Please bear in mind the admonition.

(Recess.) [468]

Recross-Examination

By Mr. Harrison:

Q. Mr. Burnham, there was offered in evidence a short time ago a copy of the resolution introduced in the United States Senate by Senator Pittman of Nevada. A. Yes.

Q. You were familiar with the introduction of that resolution about the time it was introduced, were you not? A. Yes.

(Testimony of George B. Burnham.)

Q. And about that time, and before you had discussed the question with Senator Pittman of such an investigation, had you not? A. Yes.

Q. And had you furnished him with a copy of the amended complaint in the fraud suit, copy of which has been introduced in evidence here?

A. No.

Q. Had you furnished him with a copy of the Mather letter? A. No.

Q. You told him, did you not, you believed it was a violation of the Antitrust Laws in connection with the borax industry?

Mr. Carr: We object, as incompetent, irrelevant, and immaterial; it has nothing to do at all with the issue.

The Court: I will overrule the objection.

Q. (By Mr. Harrison): What is the answer?

A. The answer is no.

Q. You discussed with him the borax situation, did you not, [469] as related to the potash situation. A. I talked to him about Searles Lake.

Q. You talked to him about Searles Lake?

A. Yes.

Q. Did you tell him about the damage you had suffered?

Mr. Carr: Same objection, may it please your Honor. We would like to keep our record straight.

The Court: Very well, the same ruling.

Q. (By Mr. Harrison): Mr. Burnham?

A. What time are you referring to now in your question?

(Testimony of George B. Burnham.)

Q. I am referring, first of all, to about the time this resolution was introduced. You discussed that subject with Senator Pittman, did you not?

Mr. Carr: What, the question of the resolution?

Mr. Harrison: Yes.

The Witness: A. I talked with him about Searles Lake, but I didn't know he was going to put it into a resolution.

Q. But you told him about the situation at Searles Lake, did you not? A. Yes.

Q. And you told him about the damage you had suffered, did you not, or that your company had suffered?

A. Yes, in 1925 or 1926, around in there I told him about the Post Office Fraud Order.

Q. And you told him about the damage that it had done to you? [470] A. Yes.

Q. Did you tell him in the '30's, around 1936, that you had suffered damage as the result of the price cuts?

Mr. Carr: Same objection——

The Witness: No, I didn't tell him.

Mr. Carr: Wait a minute, until I object, Mr. Burnham. We make the same objection as we made to the previous questions.

The Court: I will overrule the objection.

Q. (By Mr. Harrison): You had several discussions with Senator Pittman, did you not?

A. Yes.

Q. And those discussions related to the borax and potash industry, did they not?

(Testimony of George B. Burnham.)

Q. Now, you are talking about before 1936 or after 1936?

Q. Well, let us take it, first, before 1936.

A. My talks with him were in 1926 and 1928 and 1929, I believe, and they were principally about the Post Office Fraud Order, and the situation in general at Searles Lake.

Q. Well, you talked to him in 1936 and 1937, did you?

A. Yes, that was right—in 1936 and 1937, too.

Q. And you told him about your situation at Searles Lake, did you not? A. Yes.

Q. And you told him that you had been injured by reason of the price cut, did you not? [471]

Mr. Carr: Same objection, may it please your Honor.

Q. (By Mr. Harrison): Mr. Burnham?

Mr. Carr: Wait a minute.

Mr. Harrison: Excuse me.

The Court: I have forgotten now what your objection was.

Mr. Carr: I said it is incompetent, irrelevant and immaterial. It had nothing to do with the subject-matter at all.

The Court: I will overrule the objection.

Mr. Harrison: Will you read the question?

(Question read.)

Mr. Carr: And furthermore, it has been asked and answered previously two or three times.

(Testimony of George B. Burnham.)

The Court: Of that I am not sure. You may be right about that, but I don't recall the witness being questioned about his conversations.

Mr. Carr: Yes, your Honor, he was, just a few moments ago.

The Court: Yes, but counsel has divided it up into two periods, before 1936 and after 1936.

Mr. Carr: He didn't first ask any specific time.

The Court: I will overrule the objection.

Q. (By Mr. Harrison): I am now referring to conversations in 1937 as well as 1936, Mr. Burnham: You did discuss the matter of the damage that had accrued to you as the result of the price cuts with the Senator, did you? [472]

A. In 1936 and 1937, yes.

Q. Now, then, you testified this morning about this matter of your conversation with Mr. Zabriskie, and did I understand your testimony to be that according to your present recollection you had a conversation with Mr. Zabriskie on March 27, 1929?

A. On or about March 27, 1929?

Q. Can you fix the date of that conversation?

A. Pretty close to the 27th of March, 1929.

Q. That is the only date you have?

A. Yes.

Q. Now, it is true, is it not, that at the time you gave your deposition in this case, and at the time when you read through your deposition and corrected it, you did not have any recollection at all of that conversation? A. That's right.

Q. Now, have you the original telegram which you sent, or a copy of the original telegram which

(Testimony of George B. Burnham.)

you sent to your company, a draft of which you read from your notebook this morning?

A. I have the preliminary rough draft of that telegram, yes.

Q. Apart from the diary?

A. In my notebook, yes.

Q. May I see it, please? That is what—in your notebook? A. Yes.

Q. But I am now talking about the copies of the telegram, or the copy of the original telegram.

A. I wouldn't know where to look for it. [473]

Q. You wouldn't have any idea where to look for it?

A. It might be buried in our files, but on the other hand it might be thrown away. A lot of the old correspondence has been thrown away.

Q. And you don't know now where to find it?

A. No, I wouldn't know where to look.

Q. You made an endeavor to find all the papers that bear on this situation, and you have been searching for a long time?

A. Yes, but I didn't find that.

Q. And you believe you did send a telegram on that day? A. Yes.

Q. As a matter of fact, you were not in New York, but you were in Philadelphia on March 27, were you not?

A. I was in New York and Philadelphia off and on during that time. I can refresh my memory very closely from my notes I have made as to where I was.

(Testimony of George B. Burnham.)

Q. I call your attention, just for the purpose of helping you to refresh your recollection, to page 249 of your deposition, where in looking at your notes and diary, you said at line 19 on page 249:

“Well, evidently I was in Philadelphia on March 27th.”

Mr. Carr: What line is that?

Mr. Harrison: That is line 19 on page 249.

Q. I will ask you whether it is a fact, refreshing your recollection from your diary, your testimony on deposition was not [474] true that you were in Philadelphia on March 27, 1929? What are you looking at now, Mr. Burnham?

A. The various places where I was in March.

Q. Where did you make that memorandum from? A. In the black book.

Q. I would like you to look at the diary now, if you please.

A. I was in one town on one day and in another town on another day.

Q. I call your attention, Mr. Burnham, that on your deposition you did not base it on your diary, and you said you were in Philadelphia on March 27, and I would like you to look in your diary.

A. I see on March 28 I went to the Bronx Zoo and saw the Great Crown Pigeon on March——” Oh, here is another bird, “Western New Guinea, the largest and ——” looks like “Finest in the world, and the Concave C-a-s-q-u-e-d Hornbill that comes from Southwest India, imprisons its mate during incubation in a hollow tree.”

(Testimony of George B. Burnham.)

The Court: This is all very interesting, but counsel is asking you about March 27, not March 28. What does your diary show about that?

A. The diary doesn't show definitely whether the telegram was sent from Philadelphia or New York.

Q. (By Mr. Harrison): But does the diary show where you were on March 27, Mr. Burnham?

A. We had a meeting of stockholders in Philadelphia about the 24th or the 26th and a meeting of the stockholders in New York about that time, also.

Q. As a matter of fact, your meeting of the New York stockholders was on March 24, was it not?

A. On March 24?

Q. Yes.

A. I don't remember, but I was going from one town to another in very short periods of time.

Q. I will ask you to take a memorandum and look at your diary and see whether or not you were correct in your deposition when you said, "Evidently I was in Philadelphia on March 27"?

A. In my deposition I did not have exactly the dates, but I noticed I was in New York City March 24, in Philadelphia on March 26, and in New York City on March 27.

Q. What are you reading from now?

A. These notes.

Q. What notes?

A. These notes.

Q. Are they diary notes, or some other notes?

(Testimony of George B. Burnham.)

A. Those notes were gathered from the diary and from the copies of the Burnham Crystals that I sent you, or that I gave you.

Q. Were you mistaken in your deposition looking at your diary at the time and evidently you were in Philadelphia on March 27

A. The answer is right here in the telegram, apparently. Can I [476] read the whole telegram?

Mr. Carr: Yes, go ahead.

Mr. Harrison: We will get to that in a moment.

Q. Were you mistaken when you said in your deposition, looking at your diary at the time, that you were in Philadelphia on March 27?

Mr. Carr: He said, "evidently"; he didn't say "positively." It is possible for him to be in both cities on the same day.

Mr. Harris: We all understand that, Mr. Carr, but I am asking him if he was correct in his statement in the deposition that he was in Philadelphia on March 27th.

Mr. Carr: He could be in both cities.

The Witness: I couldn't answer that definitely, because I might have been in both cities the same day.

Q. (By Mr. Harrison): Were you or were you not correct in saying you were in Philadelphia on that day? Or, if you don't know, I don't want to press it.

A. I don't remember at this particular moment.

Q. Very well, and the diary doesn't furnish clear evidence as to which place you were on that day?

A. That's right.

(Testimony of George B. Burnham.)

Q. You have a note of the draft of the telegram?

A. Yes.

Q. And you don't remember now whether that telegram was sent from Philadelphia or New York?

A. The contents of the telegram gives you some idea.

Q. Did you in fact send such a telegram, or do you know?

A. I made the preliminary draft, and I am very confident that I sent it.

Q. You simply believe that because you have the draft in your book?

A. Well, it is a very important meeting, and the San Francisco office wanted to know what was going on.

Q. Will you read this, your note of the draft of the telegram, which you wanted to read a moment ago?

A. "March 27, 1929. B. C. Co.—47 at Philadelphia meeting. Results similar to New York meeting. Philadelphia meeting similar to New York. Stop. New York Finance Committee meeting Thursday."

Then I got, "B.C. Co. Would like opinion directors whether we can finance if New York Committee recommends contingent campaign. Stop. If can might suggest cash discount to stockholders paying pledges after campaign is launched and before completed in order to secure funds while campaign in progress. Stop. Wire me Commodore Hotel status borax sales and any developments regarding sale of

(Testimony of George B. Burnham.)

salts to Doblears. Stop. Zabriskie not yet heard from London in answer our letter because Baker sick."

Q. Now, what is there in that telegram that convinces you [478] it was sent from New York rather than from Philadelphia?

A. Well, just because I saw the Bronx Zoo on the next page.

Q. But that was on the 28th of March.

A. Yes.

Q. And this was on the 27th.

A. Yes, but I might have been in both towns.

Q. You might have been in Philadelphia when you drafted that telegram?

A. That is possible, yes.

Q. You made a note of conversations in that diary, of conversations you believed to be important, did you not?

A. Yes.

Q. Is there any note of any conversation with Mr. Zabriskie on March 27th on the subject of the infringement, the subject to which you refer in the draft of the telegram?

A. This is the only item I could find.

Q. In other words, the only item you could find is the reference to a draft of the telegram?

A. Yes.

Q. And there is not a line there with respect to any conversation with Mr. Zabriskie in March?

A. That's right.

Q. And you may have received that information about Mr. Baker not having answered him over the telephone, may you not?

(Testimony of George B. Burnham.)

A. No, when I read this I had brought back to me more of the [479] conversations I had with Mr. Zabriskie about the patent situation.

Q. Isn't it true that you received letters from Mr. Zabriskie in answer to your letter of January 15?

A. Well, I couldn't find anything in our files.

Q. Haven't you any recollection as to whether or not he acknowledge that letter?

A. It seems to me we should have gotten that acknowledgement but I couldn't find it in the file.

Q. You haven't any recollection now as to what answer in writing he made when you sent him that letter on January 15? A. No.

Q. Nor, when he made it, if he did make it?

A. No.

Q. And at the time of your deposition you didn't remember this conversation at all, did you?

The Court: He has already answered that.

Mr. Harrison: Yes.

Q. The fact is, as I get it from your diary, you made notes about the birds at the Zoo, but you didn't make any notes about the Zabriskie conversation in March, is that correct, Mr. Burnham?

A. Yes, that is correct.

Q. Let us turn to that May 17, 1929, note in your book. Mr. Carr asked you some questions about that this morning and [480] you testified, as I understand it, that the first page was written in at the time of the conversation, but that the other page was written two days later, or thereabouts, isn't that true? A. Which other page?

(Testimony of George B. Burnham.)

Q. Well, the other entry. You have it before you. Will you turn to it?

A. You mean the other conversation with Mr. Zabriskie?

Q. No, I am talking about the Emlaw conversation on May 17, 1929: You have one page which you say was made about the time of the conversation, and Mr. Carr asked you why some other note about what Mr. Emlaw said appears on another page: You remember that?

A. Yes, this is several pages over.

Q. Yes, and you said it appeared several pages over because you wrote it several days after the conversation, isn't that true?

A. Not several days.

Q. Well, a couple of days?

A. Not several pages.

Q. Well, two pages over.

A. Wait, the March conversation was here on these pages and the May 17 conversation was——

Q. I can save you the trouble.

The Court: Mr. Harrison is not inquiring about that. [481]

The Witness: A. Then I misunderstood your question—excuse me.

Q. (By Mr. Harrison): I am talking about your notes of the May 17 conversations with Mr. Emlaw. A. Yes.

Q. And I call your attention to the fact that a part of the notes of that conversation appears upon your page, is that correct? A. Yes.

(Testimony of George B. Burnham.)

Q. And you also have a note at a later page, something to the effect that "Emlaw says"?

A. Yes.

Q. You told Mr. Carr this morning and testified in response to his questions that that later entry did not appear on the same page as the first entry because the later entry was made a couple of days thereafter, isn't that true?

A. Yes, something like that.

Mr. Carr: I don't think he said "a couple of days."

Mr. Harrison: He said, "Something like that" just now, Mr. Carr. I think he can take care of himself on this.

Mr. Carr: Yes.

Q. (By Mr. Harrison): Now, what I want to ask is this: Is there anything in the entry which you first made on the original page that refers to any accusation or denial of any discussion whatever of your charge and accusation of conspiracy? [482]

A. With——

Q. With Mr. Emlaw.

A. No, not with Mr. Emlaw.

Q. And the only entry you claim now has any reference at all to that discussion of that subject was some entry you made sometime later at a later page, isn't that true?

A. Yes, but I remember the conversation.

Q. Yes, and I understand you so testified. Now, then, on that phase of the question, it refers to a sale but it doesn't say what thing is being sold, does it?

A. No.

(Testimony of George B. Burnham.)

Q. Now, let me refresh your recollection on that matter: Hadn't you been discussing with Mr. Zabriskie the question whether somebody had bought out the American Potash & Chemical Company, the du Ponts?

A. Mr. Zabriskie asked me if I *knew* had bought out the American Potash & Chemical Corporation.

Q. Now, then, you will read—excuse me. Have you finished?

A. At least that matter came up at our conversation.

Q. The answer was, had they been sold out?

A. Yes.

Q. Now, will you read literally what you had on the other page with respect to what Mr. Emlaw says?

A. "May 17, 1929"—

Q. That is the second entry now. I have no objection to your [483] reading the first, but what I am interested in is the second entry, the one on the second page.

A. Not necessarily second in time—

The Court: We are wasting too much time going over the same entries. Start reading the entry that begins with the words "Emlaw says."

A. "Emlaw says not selling—nothing in it—would sell if could get an offer."

Q. (By Mr. Harrison): You know as a matter of fact that as far as borax was concerned he was selling at the time, do you not?

A. That is what he told me.

Mr. Harrison: That is all.

(Testimony of George B. Burnham.)

Mr. Carr: That is all.

The Court: That is all.

Mr. Carr: Oh, just one more question.

Further Redirect Examination

By Mr. Carr:

Q. Mr. Burnham, was it possible for you to be in both Philadelphia and New York on the same date? A. Yes.

Q. And when you testified on your deposition and said, "Evidently I was in Philadelphia," did you or did you not mean that you were positively in Philadelphia, or were you surmising?

A. I was roughly guessing. [484]

Mr. Carr: That's all.

Mr. Harrison: That's all.

The Court: That's all, Mr. Burnham.

Mr. Carr: Plaintiff rests.

(Plaintiff rests.)

Mr. Harrison: We rest.

(Defendants rest.)

The Court: I will excuse the jury at this time until tomorrow morning.

Ladies and gentlemen of the jury, the court will probably have some legal matters to discuss with counsel at this time, as you may have surmised from various colloquies. I will therefore excuse the jury until tomorrow morning at ten o'clock. Please bear in mind that it is still your duty not to discuss this

case among yourselves, nor allow any other persons to discuss any matters in connection with this case with you, nor are you to form or express any opinion thereon until the case is finally submitted to you.

(Thereupon the jury was excused from the courtroom.)

Mr. Harrison: We desire to make a motion at this time to instruct the jury to answer in the affirmative to the question submitted to them, and we make that motion on two separate grounds:

In the first place, that the evidence shows without conflict that the plaintiff did know and had cause to believe [485] at times during the period specified in the question that he had been damaged as the result of violations of the United States Anti-trust Laws by the defendants; it appearing that there is an affirmative evidence that he had so known and there is no contradiction to that beyond mere opinion evidence on his part.

The second ground of the motion is that it now affirmatively appears that the only statement made by Mr. Zabriskie or Mr. Emlaw which could have been relied on by the plaintiff was a mere naked denial of the accusation of conspiracy. The only other statements made by them at that time having any relation to the subject were of facts which the plaintiff already knew and the plaintiff has no right to rely upon a mere denial of an accusation.

Mr. Aitken: May the record show that the defendant American Potash & Chemical Corporation joins with Mr. Harrison's clients in this motion.

The Court: Yes.

Mr. Carr: The evidence is clear that the plaintiff did not know of the so-called conspiracy, never heard of it until 1944, and never heard anyone discuss it. The evidence also shows, or rather his statement is that he did not know any of these things prior to or in response to the question which your Honor states you would submit, knew nothing of those things. His answers were "No" to all of them, so you have a clear conflict [486] that should go to the jury.

At the same time we desire to make a motion for an instructed verdict on our behalf because the evidence shows conclusively that the plaintiff knew nothing about the 1929 agreement and conspiracy which is the basis of our action.

We did not plead these overt acts, as charges in our complaint, but every reference to them was as overt acts of the conspiracy so-called. Now, we having elected to stand on that conspiracy, and with all due respect I say neither the court nor counsel can change our course of action into actions on the separate cause of action, that is, the overt acts, rather.

We believe as the evidence now stands we are entitled to a directed verdict in our favor because the only question that could be presented under the state of the pleadings is whether or not the 1929 conspiracy which is the basis of our action, was known, or that plaintiff had any knowledge of that at any time prior to November 10, 1939.

We believe on that ground we are entitled to a directed verdict, that the only evidence brought

out by the defendant is as to these overt acts, the separate overt acts. No evidence at all exists at all to show any knowledge on the part of the plaintiff of the 1929 conspiracy, and that is as I have stated many times, and I do not intend to be boresome to your Honor, but there is no evidence of the 1929 conspiracy, [487] that it was known to us, and that conspiracy is the basis of our action, not the overt acts.

We are not suing for damages for the overt acts. We are suing for damages which accrue to us by the existence of the '29 agreement.

The Court: You mean you can form a conspiracy after the overt acts are committed?

Mr. Carr: Why, yes, your Honor, certainly. The fact that we might not be able to recover on those prior overt acts is one thing, but we are suing that the damage resulted to us subsequently. [487-a]

If we wanted to sue alone on the fraud order case, we, of course, would have sued on that conspiracy, likewise on the price cut, but we did not elect to do so. We elected to sue on the main conspiracy of 1929. Now, the question of whether we would be able to recover on the main conspiracy of 1929. Now, the question of whether we would be able to recover on the main trial for those things that existed prior to the 1929 conspiracy is an entirely different thing. That question is not presented here at all. That question is not involved in this. The only question here is that we know of or have any knowledge of or were put on notice of the 1929 agreement. That is the only thing, and with all due respect to your

Honor's question and to counsel, that cannot be changed: The plaintiff having elected to stand on that 1929 agreement, he is entitled now so to do.

The Court: Of course, if the evidence were to show without dispute that he had knowledge of the 1929 conspiracy within the period of the statute of limitations, his action would now be barred——

Mr. Carr: Not in the slightest, no. The evidence is all to the contrary.

The Court: If both sides are making a motion for a directed verdict in this case, isn't that pretty persuasive that it is a matter of law for the court to decide?

Mr. Carr: No, I do not think so. I think we are entitled [488] to go to the jury.

The Court: Here is what is disturbing me about this case, Mr. Carr: Maybe I am taking too quick a look at it, as it were, not an objective enough look at it. We have had one witness who has testified in this case. What factual controversy is there for the jury to resolve? Nobody has disputed the questions of any conversation, the execution or sending of any document. What factual matter would the jury have to decide—for example, whether or not a conversation occurred, when it has not been disputed?

Mr. Carr: This is the question involved: Did the plaintiff have knowledge of the 1929 conspiracy, or was he put on notice?

The Court: That is the question, but does the resolution of that question require the settlement of any disputed factual questions?

Mr. Carr: Yes, your Honor.

The Court: What testimony has come into this case of any factual nature that is disputed?

Mr. Carr: There is none——

The Court: It is disputed that the man had knowledge.

Mr. Carr: No.

The Court: That becomes a question of law, if the occurrences themselves are not in dispute.

Mr. Carr: No, your Honor, there is no dispute of Burnham's testimony as to his lack of knowledge of the 1929 agreement. [489]

The Court: I do not think I made clear to you what I meant. The witness Burnham has testified to certain facts. He has testified to conversations he had with people. He has testified to letters that he wrote. He has testified to letters that he received, documents that were executed by him or received by him have been put in evidence. Now, none of those things that he has testified of a factual nature have been disputed by anyone.

Mr. Carr: But they all involve the overt act and not the 1929 conspiracy.

The Court: Irrespective of what they involve, what is there in dispute of a factual nature?

Mr. Carr: There is nothing so far as we are concerned as to the 1929 agreement. Burnham testified that he did not know about it.

The Court: Of course, there are documents in evidence that he signed that, irrespective of what he said, might be susceptible to the interpretation that he did have a full knowledge of that, but there

is no factual question that arises. It is a question whether that in law amounts to knowledge, and I cannot submit a question of law to the jury.

Mr. Carr: No, your Honor, that is not the situation. The question is, all of those things which you have mentioned referred and all the testimony has gone to the commission of [490] the overt acts, not to the conspiracy. They all have referred to the overt acts. Let us suppose, for the sake of—

The Court: Mr. Carr, I cannot agree with you on that. If I were going to decide the case as the trier of the fact, I can recall documents that have been offered in evidence that refer, if you go back and look at some of the letters that were written after 1929—

Mr. Carr: But they do not refer to the 1929 agreement. That would not show they had knowledge, because they were all in reference to overt acts, not to the conspiracy, itself. Evidently our minds do not meet, if it please your Honor.

The Court: Our minds do not meet on that because I could not possibly hold, and I do not think there is any decision that goes to the effect that in order to show a person has knowledge of a conspiracy you have to show that he actually knew of an agreement that was in existence. There is no such law as that.

Mr. Carr: You are right, but the evidence here goes, as I say, to the overt acts, the commission of the overt acts. There might be a conspiracy in advance of the general conspiracy. There could be a conspiracy to permit the fraud order. There

could be a conspiracy involving the price cuts. There could be a conspiracy involving the Little Placer, and likewise the Searles Lake. There could be all of those, four different conspiracies. Now, all the evidence goes to prove [491] that plaintiff should have known about there being a conspiracy to fix the prices, a conspiracy to put the fraud order case, but that is not evidence of the basis of our complaint, and neither your Honor nor counsel have a right to change our complaint from a complaint and a cause of action based upon the conspiracy of 1929 to four other conspiracies involving overt acts. Now, you have no right to do that—and I am speaking with all due respect, your Honor, on the legal question. You cannot change the cause of action.

The Court: I am not attempting to change your cause of action. The only question before me now is whether or not there is any factual dispute that the jury can pass upon. How am I going to instruct the jury as to the facts in the matter? It is not disputed, no one has disputed Mr. Burnham's statement as to his conversations with these various people. No one has disputed the sending or receipt of the various documents. There they are. Now, what conclusion should be drawn as to whether or not there was knowledge of this conspiracy, no matter what conspiracy you are referring to, is not a matter that requires any factual resolution, does it?

Mr. Carr: Yes, it does, whether they gave facts, whether they gave information of the conspiracy, but they were all directed to the overt acts and not to the conspiracy charged in our complaint, and

upon which we are entitled to rely. Now, all of the evidence—and I say again at the expense of [492] repetition—all the evidence only goes to the conspiracies involving each overt act. Not one of them touch or indicate in the least that we had any knowledge of the basic conspiracy of 1929 until the filing by the Government here of its indictment. There is no evidence at all on that subject, absolutely none, and counsel cannot attempt to change our cause of action from one on the basic 1929 conspiracy to one on four different overt acts. We are not trying the overt acts on the main question. When the main case comes up, unless we can prove that we suffered damage from these overt acts or these activities prior to the 1929 conspiracy, we can, of course, not recover. That is not the question here.

The Court: You mean you could not show any damage from the 1929 conspiracy?

Mr. Carr: Under the 1929 conspiracy which we stand on here.

Mr. Harrison: He does not plead any damage under the 1929 conspiracy.

Mr. Carr: Oh, yes, we do. We plead lots of damage.

The Court: Maybe I misunderstood what you just said. I gathered from what you said that you would not be able to show any damage from the 1929 conspiracy.

Mr. Carr: No, I said if we could not. I do not say we cannot, because we believe we can. But the overt acts all go to the measure and extent of the damage resulting from the [493] basic con-

spiracy of 1929. If we cannot, when it comes to the main trial, prove that those damages were not incurred as the result of the 1929 conspiracy, of course, we cannot recover. But that is not the question here. The question here is whether or not the statute has run as to the 1929 conspiracy, and nothing else is before this court at this time.

Mr. Harrison: May I be heard, if the Court please, briefly?

The Court: Yes.

Mr. Harrison: Most of the matters about which Mr. Carr speaks at the present time were discussed at considerable length on the motion to dismiss, and upon the motion settling the issue to be tried here. Now, we pointed out in connection with the motion to dismiss and the motion for summary judgment that the mere fact that a conspiracy has existed between the defendants does not give the plaintiff any cause of action at all. It is elementary that in order that there be a cause of action there must be concerted action or other violation of the Antitrust Law, and as a result of that damage done to the plaintiff. Now, there were two items pleaded in the complaint as damage done to the plaintiff. One was the fraud order of 1925, and the other was the driving from the business as a result of the price cuts of June, 1929. Those were the specific things that caused damage. Those were the only [494] things that could give rise to a cause of action on behalf of the plaintiff against the defendants, and that cause of action accrued when the damage accrued, and the plaintiff cannot create out of thin air by a mere

allegation that a conspiracy was formed in 1929 a cause of action because he does not allege that any damage resulted from that. He alleges the only damage that resulted to him was the damage done from the price cut and the damage done from the fraud order.

Now, your Honor will remember that in connection with the motion to dismiss counsel talked about a continuing conspiracy, and the 1929 conspiracy, and I thought it was clear at that time that the conclusion had been reached that unless there was some item of concealment, the statute of limitations began to run as soon as the damage occurred. Now we are trying at the present time the question of whether the plaintiff had knowledge of the violation of the law to his damage between those two dates. And why did your Honor fix May 17th as the first date? Because the only act of concealment which is alleged in the complaint is the Zabriskie conversation of just that date. Of course, if that concealment operated to interrupt the statute of limitations, and if the plaintiff did not thereafter have any knowledge or cause to believe, and if he had a right to rely, then the statute might apply, but the concealment, your Honor will note, related solely to the price cuts of 1928. It had nothing to do with any conspiracy [495] of 1929, and the only question, therefore, presented now is, whether or not, in the first place, the plaintiff had a right legally to rely on the statement made by Zabriskie and, in the second place, whether or not after that time, and before 1939, he had a belief or cause to believe that he had a cause of

action. If he did not have a right to rely, or if at any time after that he had knowledge or cause to believe, then it necessarily follows as a matter of law, that this action is barred. I had understood that the case had proceeded so far that your Honor felt that your Honor was not quite ready to render summary judgment on the statute of limitations because there was this claim about the Zabriskie conversation, and there might perhaps be a vestige, or cloud, or a conflict of evidence or testimony as to the plaintiff's condition after that time. But up to that point it had been settled that there was no act of concealment as to Zabriskie's statement, and it certainly appears now, if it did not appear then, that Zabriskie's statement related not to any imaginary 1929 conspiracy, but to the concerted action of these defendants in 1928, which under the complaint was the thing which caused the plaintiff's business to shut down.

There are only two things alleged in the complaint which could possibly constitute a cause of action, because they are the only two things that are alleged to have damaged the plaintiff: [496]

No. 1, the fraud order in 1925; and No. 2, in 1928 when they cut the prices and drove him out of business. Now, then, if there had not been any concealment, if the Court please, we would have been entitled to a summary judgment on the defense of the statute of limitations, because three years after the damage occurred the cause of action would have been barred, but the claim is set up that a statement was made by Mr. Zabriskie in 1929, and then

the question arises, what statement did he make? If he made a statement, did the plaintiff have a right to rely upon it, and did the plaintiff, notwithstanding the statement, have knowledge or cause to believe during the succeeding years prior to the statutory period that a cause of action existed? But if we were trying here anything except concealment of the price cuts, then the whole question is wrong, and your Honor's prior rulings are wrong, and the plaintiff cannot convert something that does not constitute a cause of action, to wit, an allegation of some sort of conspiracy in 1929 that did not cause damage, into a cause of action simply by adding it in midair in the complaint. It is perfectly clear from the complaint it was only the alleged concerted action in 1925 and 1928 that caused the damage, that the cause of action, if it existed, arose at that time and not later, not by reason of any later facts; that three years after the cause of action arose it was barred unless the Zabriskie conversation could be relied upon, and the plaintiff [497] did not know or have cause to believe after that time, and it was because of those facts that your Honor settled the question as you did.

Your Honor will remember the question before the jury is whether or not the plaintiff knew or had cause to believe at any time between May 17th, 1929, and October, 1939, that it had been theretofore, that is, prior to May 17th, 1929, injured by the defendants as a result of their violation of the Antitrust Laws.

The Court: I do not think you have to labor that point, Mr. Harrison, because all the preliminary motions and argument had to do with that very subject.

Mr. Harrison: Yes, your Honor.

The Court: Mr. Carr submitted a number of authorities in his memorandum to the effect that where a defendant is guilty or is claimed to be guilty of fraudulent concealment of the cause of action, the statute of limitations does not operate until the aggrieved party discovers the existence of the cause of action.

Mr. Harrison: That was his claim.

The Court: That was the basis upon which the motion for summary judgment was argued and was the basis upon which the discussions were had in the matter of the submission of the special issue to the jury, and I see that in the complaint itself it is alleged in paragraph 75 that the damage to the [498] plaintiff occurred in 1928 and 1929, in the early days, and the plaintiff relied upon this conversation with Zabriskie in 1929. It is set forth in the complaint. That which is referred to there is not a conspiracy that thereafter took place but a conspiracy that had theretofore existed. [498-a]

It is very plain. That is the whole basis upon which all of the preliminary matters were presented to the Court in this case. Despite the fact that Mr. Carr seems to think I have been busy on other matters, I have a pretty clear recollection of the issues that were submitted in this case, and no one has ever suggested before that we are talking about

a conspiracy that occurred in 1929, that was concealed in 1929 as the result of a conversation with Mr. Zabriskie.

Mr. Carr: If it please your Honor, our answers to them are full of those contentions. We have always rested on the allegations of our complaint. Let me read you Paragraph 81:

“That all of the above acts done and performed by defendants or some of them have been in pursuance to and in furtherance of said conspiracy, plans and combinations hereinbefore in this complaint set forth and described and with the intent and purpose of controlling and dominating throughout the world and in interstate commerce the mining, production and the sale of borax in all of the various forms and products, and with the intent and purposes of injuring and destroying Plaintiff’s activities as herein set forth and removing Plaintiff as a competitor of defendants or some of them in said mining, production and selling of borax in all its forms; that due to said intents, purposes and acts of defendants plaintiff has been damaged in the sum of \$1,168,000,” and so [499] forth.

Now, what are the charges up here? The charges are the fraud order case, the price cut, the opposition, the forcing, the losing of our lease on Searles Lake, which we attribute to the defendants, and which occurred long after the 1929 conspiracy, and also the contest and fight over the Little Placer, their objections to our going ahead with the Little

Placer, all of which or the greater part of which occurred after 1929. It is true that in the fraud order case and in the price cuts and in some portions of the Little Placer some of those things existed prior to 1929, but many of them continued afterwards and, as I have said, have therefore come in, and we allege that in 1929, when this conspiracy was reduced to writing, they picked up and included within it all of the conspiracy——

The Court: Do you mean that they conspired to something that they had already done?

Mr. Carr: To carry on what they had started—not completed, because they did not complete our destruction until along in 1938, until we lost our Searles Lake lease and our property. Now, if under the charge of conspiracy we could not prove that damages from the fraud order and the price cuts occurred, any portions of them occurred to us after 1929, of course, we could not recover.

The Court: You are contending there were separate conspiracies then?

Mr. Carr: Yes, in a sense.

The Court: Either you are or you are not.

Mr. Carr: Let us say we are. We are contending in 1929 they made a conspiracy to put everybody out of business, all of the competitors.

The Court: Now, what they did to you after 1929 caused you to lose your lease?

Mr. Carr: Caused us to lose our lease and caused the reinstatement of the Postal fraud order. They caused us to lose our lease, our plant, also our physical plant in which we had invested a million dollars or more.

The Court: On that cause of action what concealment are you going to rely upon as to the 1929 conspiracy?

Mr. Carr: Well, the 1929 conspiracy, the same thing, and the evidence which your Honor rejected, which we believe should have gone in because it showed the intent and purpose of this conspiracy to secrete it and cover it up.

The Court: Yes, but how do you get at the statute of limitations, assuming you are claiming some damage because of acts committed subsequent to 1929 and pursuant to the 1929 conspiracy? What is the impact of the statute of limitations with respect to that matter? The Zabriskie conversation does not have anything to do with that, does it?

Mr. Carr: Yes, it does, because Mr. Burnham was induced at that time to believe that these people were acting lawfully and without conspiring—he testified he continued to believe Zabriskie right up to the end.

The Court: How could he believe Zabriskie as to a conspiracy which had not yet taken place?

Mr. Carr: Surely he could.

The Court: I do not follow that.

Mr. Carr: He testified he believed him when he said they did not conspire to cut the prices.

The Court: That might refer to the other conspiracies. We are now talking about the point you are making that you have a separate conspiracy for 1929.

Mr. Carr: That is the basis of our complaint.

The Court: That was entered into in 1929.

Mr. Carr: Yes.

The Court: And that the overt acts in connection with that are the final taking away of your lease in 1937, was it?

Mr. Carr: 1938.

Mr. Harrison: January, 1938.

The Court: January, 1938. Now, you filed your suit in 1945.

Mr. Carr: Yes, sir, your Honor.

The Court: Now the statute of limitations would run on that claim unless you have some fraudulent concealment of [502] that conspiracy. What have you alleged or shown in connection with that matter?

Mr. Carr: Well, the conspiracy was self-concealing of 1929 and we knew nothing about it.

The Court: You lost your property in 1937 and 1938?

Mr. Carr: Yes, your Honor.

The Court: There is testimony as to the witness Burnham's conversations and correspondence concerning that matter.

Mr. Carr: Yes.

The Court: So at the time you knew about it.

Mr. Carr: No, we didn't know about it.

The Court: You knew your property had been taken away from you; that is the damage you suffered at that time.

Now, you have to bring your action on that damage during the statutory period unless you are able to show that there was some fraudulent concealment that you did not have knowledge of.

Mr. Carr: He also has testified that he did not know of it, and the law supposes that a conspiracy is self-concealing. Your Honor has stated that on this trial. The law is that a conspiracy is self-concealing, and the various facts of the whole thing——

The Court: Of course, if it is self-concealing it would not make any difference. You could bring a suit fifty years [503] afterwards then.

Mr. Carr: What is wrong with that? Why should time cure fraud, deceit and dishonesty? Time only cures valid claims. It does not cure fraud. It does not run against fraud or deceit or concealment.

The Court: It does run after discovery.

Mr. Carr: Until discovery. It starts when the discovery comes, but fraud does not cure deceit and wrongdoing, and if it was fifty years, what is the difference? Why should the statute of limitations constitute a defense to fraud?

The Court: An action for damages under the Anti-Trust Law is not an action for fraud.

Mr. Carr: No, your Honor, but the fraud tolls the statute.

The Court: That is a new statutory right that is given you. It is not an action for fraud. The only fraud that is involved here is the issue that you have raised: Was there a fraudulent concealment?

Mr. Carr: It was, and we believe we have shown it.

The Court: That has nothing to do with the cause of action; that has to do with the tolling of the statute of limitations.

Mr. Carr: The tolling of the statute and, furthermore, we have another ground: It is a continuing conspiracy. Your Honor has never passed on that and we have not presented that [504] here for the reason that that is a question of law. No matter what happens here with this jury, your Honor was going to have to pass or, rather, we were going to ask you to pass on the question of the continuing conspiracy. Now, the Kissel case we believe absolutely in point, and the other cases involved there, and I would like to ask your Honor to express an opinion now without——

The Court: Let us assume you are right, Mr. Carr, and that you have a separate cause of action on what you claim to be is the 1929 conspiracy which resulted to your damage in 1938, and let us assume that we have a record here which discloses what was or was not done or happened after 1938 that would affect the timely presentation of the cause of action: What dispute as to the facts involved as to that particular portion of your complaint is there?

Mr. Carr: 1938 was not the only one. The Little Placer fight went on until the very end, and that would be enough to toll the statute, until the very end. The Little Placer claim is very valuable. That claim is worth over ten million dollars. It is one of the finest bodies of borax there is in the world. We fought for that, and they have resisted us all along and conspired in every way to prevent us, so if we had nothing left in the way of damages except the Little Placer, we would be all right. We would get a judgment, or I mean we could suffer damage far

in excess of [505] what we ask for. That fight never ended until the decision of your Honor in this case caused them to abandon their action in Washington to force the Department to give them the lease on the Little Placer. That continued up to the conclusion of that case, your Honor, and the damages were there. So that is in addition to there being a continuing conspiracy in the matter. No matter what happens here we will ask your Honor to pass on that continuing conspiracy under the reservation you made in your order that you would pass on the motions to dismiss subsequently to this. You held the motions in abeyance pending the determination of this case. With all due respect, I think the error and trouble arose from the form of your Honor's pre-trial order in fixing the dates.

The Court: Of course, if I were not to submit this matter to the Jury on the ground that there was no issue of fact to be considered by the Jury, and I decide it myself, I will decide the entire question as to whether or not the cause of action is barred by the statute of limitations, because, after all, that is the question the Court has to determine after a verdict of the Jury, if the question were presented to the Jury.

Mr. Carr: I do not think we would have any objection if your Honor wanted to withdraw the case and take it up for your own decision. We have no objection to that. We know [506] your Honor will decide it according to your best views.

The Court: Offhand, Mr. Carr, I am not going to decide this tonight, because I am going to take

it home with me and look at it some more, but my feeling in the matter is there is no question of fact to go to the Jury. I do not see what the Jury can decide in this case. I think it is up to the Court to decide on the undisputed testimony here whether as a matter of law there was or was not the knowledge here that makes this action untimely brought, and I think that is all there is involved in the case. I am not anxious to assume the burden of trying something that a Jury can decide. I assure you I have plenty of other things to do. But I have to determine that point as my conscience dictates, and if it is a question of law, I should not befuddle the Jury of trying to decide some questions that they could not properly decide.

Mr. Carr: We are not consenting at this time to any such——

The Court: I do not want you to waive anything. You asked for a jury and you are entitled to have a jury if there is a question of fact in the case.

Mr. Carr: This is an equitable case and it is in your Honor's discretion. I would like to make one more observation. Your Honor stated when we were discussing the presentation of the question and you thought I had made some [507] suggestions to you about the dates, I think if your Honor will look at Mr. Lasky's letter of December 12——

The Court: I had my file out in that matter, Mr. Carr. I did not mean that you had suggested those dates, but after Mr. Lasky had written me a letter suggesting this form of order, then you wrote me a letter, too, about the matter.

Mr. Carr: I think I wrote you giving you the Bear Film case, when your Honor on the argument requested both of us to present to you our respective suggestions, and your Honor said that then you would take both of those and work out a question.

Mr. Harrison: That is right.

The Court: I think in the case you were arguing that the matter was purely a question of knowledge and the other side were arguing that it was a question of belief.

Mr. Harrison: That is right.

The Court: So I wanted to give each side the benefit of his contention and make it real broad, and that was the reason why I said, "either knowledge or reasonable cause to believe," because I felt that that would be a broad enough catch-all to really do justice to the issue.

Mr. Carr: Another illustration of the unfortunate situation we get into by trying to please both sides. Thank you, your Honor.

The Court: I will take both motions for direction to [508] the Jury under advisement and decide them in the morning when the Jury comes in.

Mr. Carr: Will your Honor consider in so doing tonight the last instructions which we handed you this afternoon?

The Court: Yes, I will look at all the instructions.

Mr. Carr: And we would like to have at this time, so there will be no mistake about it, objections to all the suggested findings of fact presented by the defendants.

Mr. Harrison: You mean instructions.

Mr. Carr: Instructions.

Mr. Harrison: And similarly we have objections to the instructions proposed by the plaintiff.

The Court: If the case goes to the Jury I will make a note at the time, so you will all have whatever exceptions you want in that regard.

Mr. Harrison: In the event your Honor should deny these motions we will discuss then the time for argument.

The Court: Yes.

(Thereupon an adjournment was taken until tomorrow, April 3, 1947, at 10:00 o'clock a.m.)

Thursday, April 3, 1947, 10:00 o'Clock A.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Carr: Ready.

Mr. Harrison: Ready.

Mr. Carr: Your Honor, may I present another requested instruction that we have?

The Court: Very well.

In this case the complaint was filed on July 3, 1945. By it the plaintiff corporation seeks to recover damages caused to it because of asserted violations by the defendants of the Sherman Anti-Trust Law, 15 U.S.C. Section 15. Subsequent to the filing of the complaint the defendants moved for a dismissal of the case and for a summary judgment in favor of the defendants for the reason, among

other grounds, that the action was barred by the statute of limitations. On September 20, 1946, the court, heeding the admonitions of our circuit court in cases of similar motions, denied the motion for summary judgment for the reasons stated in the order made by the court at the time, and principally for the reason that there might be a factual question in some way necessary to be decided in connection with the plea of the statute of limitations. The decision on the motion to dismiss was reserved at that time. The court ordered then that there be a special preliminary trial for the purpose of determining such factual issue as would be requisite for the determination by the court of the motion to dismiss upon the ground that the action was barred by the statute of limitations. The defendants then, as directed by the court, filed a special answer to the complaint setting up the statute of limitations as a special defense. Then the plaintiff moved to set the special issue for trial before a jury, and that motion was granted, and the case was set for trial before a jury for the purpose of determining such factual issue as might be necessary to aid the court in determining the plea of the statute of limitations.

After that was done, a pre-trial conference was held, and on January 16th the court made a pre-trial order by which it was directed that the special issue to be submitted to the jury shall be as follows:

“At any time from May 17, 1929 to October 10, 1939 did the plaintiff know or have good cause to believe that its business had been

theretofore damaged by acts of the defendants in violation of the Antitrust Laws of the United States?"

Upon the decision of this special question depends the court's determination of the plea of the Statute of Limitations.

The trial of this special issue was commenced on March 26th and continued on March 27th, March 28th, April 1st and [511] April 2nd, with presentation of evidence by both sides. The evidence was concluded yesterday, April 2nd. Only one witness testified in the case, the president of the plaintiff corporation, and all evidence on behalf of both the plaintiff and the defendants was elicited either from him or while he was on the witness stand.

The plaintiff, at the conclusion of the evidence yesterday, moved that the court direct the jury to answer the special inquiry in the negative. The defendants separately moved that the court direct the jury to render a verdict on the special issue in the affirmative. The court may and it should direct a verdict if the evidence is undisputed or if the evidence, even though it be conflicting, be so conclusive that the court, in the exercise of sound judicial discretion, should set aside a verdict in opposition to it. *Brady vs. The Southern Railway Company*, 320 U.S. 476; *Farr Company vs. Union Pacific Railroad*, 106 Fed. (2d) 437; *National Mutual Casualty Company vs. Eisenhower*, 116 Fed. (2d) 891; *Mutual Benefit Life Insurance Company vs. Snyder*, 109 Fed. (2d) 469; *Oklahoma Natural Gas Company vs. McKee*, 121 Fed. (2d) 583.

It appears to the court in this case that the evidence upon the issue now before the jury is undisputed. All of the evidence shows both knowledge and good cause to believe on the part of the plaintiff during the period specified in the special inquiry, that its business had been damaged by [512] acts of the defendants in violation of the Antitrust Laws. The statements of the president of the defendant corporation, who was the only witness in the case, that he had no knowledge or cause to believe, are opinions, and in the opinion of the court are therefore not proper evidence. However, even if the statements of the president of the corporation, who was the only witness, that he had no knowledge or cause for belief be considered as evidence, the court would still direct a verdict in the affirmative upon the special issue, because the evidence is so conclusive in favor of an affirmative answer upon the special issue that the court would set aside a negative reply by the jury to the special issue. Statements in writing and under oath by the witness Burnham, who was the managing president of the plaintiff, commencing in 1925 and continuing throughout the years to 1940, show without dispute a continued awareness and knowledge of the plaintiff's cause of action set out in the complaint. Not only that, but these writings make continuous claim as to the responsibility of the defendants for the loss and damage caused to the plaintiff's business. Consequently, no mere lip service to the contrary can rise to the dignity of creating a factual conflict for resolution by the trier of the fact. There has

been no evidence in the opinion of the court of any fraudulent representation or concealment by the defendants of the plaintiff's cause of action which deterred the plaintiff [513] from timely presentation of its claim in this court. The so-called Zabriskie and Enlaw conversations do not by any stretch of the imagination go beyond denials of the plaintiff's claim. In no sense do they reach the stature of fraudulent representations or concealment of such an affirmative nature as to in law be misleading to the plaintiff. Moreover, the evidence without dispute shows the plaintiff did not rely upon the statements made by these two men and hence there is no proof of any misleading character to be attributed to them.

One other matter requires comment by the court. I should like to make it abundantly clear that the court does not hold any brief for the defendants in the case. It would not be an unreasonable inference from the facts so far presented in this case, as well as from the court's judicial knowledge by virtue of the criminal and civil proceedings brought by the Government in this court, that the alleged acts and conduct of the defendants might well have caused the ruination of the plaintiff's business. But this court is not called upon to determine the merits of the case. Neither the judge nor the jury, if permitted to proceed to determine the case, are so concerned. I make this comment because there has been a contention made by the plaintiff that the plaintiff made every effort and used every diligent procedure at its command to endeavor to obtain what it

stated to be the necessary evidence [514] in connection with its asserted cause of action. However, the law does not excuse an untimely presentation upon the ground that the party asserting the claim has been unable to obtain others to aid in the presentation of the claim. The burden of presenting an asserted claim in a legal proceeding always rests upon the party who has and asserts it, and he may not excuse untimely presentation because he has been unable to enlist the aid of others in order to bring about adjudication in the court of his claim.

The plea of the statute of limitations is not a technical one. No court can disregard it because of a personal desire that someone may ultimately obtain recompense for an injury alleged to have been suffered. The statute of limitations plea is as much a component part of the scheme of administration of justice as is the theory that a just claim should be given consideration by a court. There are many reasons why claims must be timely presented. For the reasons the court has stated the plaintiff's motion for a directed verdict will be denied and the defendants' several motions will be granted.

Ladies and gentlemen, the decision which the court has just made will excuse the jury from any further consideration of the case. It sometimes happens that even though a jury has sat for a long time in hearing evidence in a case, as in this unusual case, it becomes necessary as a matter of law [515] for the court to make a decision which takes the case from the hands of the jury. Therefore,

because of the fact that the court has directed the decision in this matter, it will not be necessary for the jury to make any decision in the case. I wish to thank the members of this jury for their attention and attendance upon the trial of this case, and to assure the jury, even though you have not been called upon to make a decision in the case, you have nevertheless by your attendance in the case made your proper contribution as to this case. The jury may be excused at this time.

Mr. Carr: At this time may the plaintiff except to the denial of its motion? Your Honor has ordered a denial of its motion for a directed verdict. I also except to the order of your Honor granting the motion of the defendants for a directed verdict.

The Court: Very well. The record will so show.

Mr. Harrison: I assume, your Honor, no formal verdict is necessary?

The Court: I do not think so. The jury may be excused.

(Thereupon the jury were excused and retired from the courtroom.)

The Court: Inasmuch as the court has directed the verdict in this matter, Mr. Carr, I would like to ask you whether or not, before the court passes upon the motion to dismiss on the ground that the action is barred by the statute of [516] limitations, if you wish to have an opportunity to present any other ground in opposition to the granting of the motion.

Mr. Carr: I do, your Honor, upon the ground of a continuing conspiracy.

The Court: Would you like to present that in some formal manner, or would you like to make a statement so that the record may have what you have to say on that point?

Mr. Carr: Whatever your Honor prefers. The contention will be that this was a continuing conspiracy, and therefore the statute did not begin to run until the end of the Little Placer litigation, the last overt act under the conspiracy, until its termination, which was the dismissal by order of this court of the application for the Little Placer claim. I have not my authorities with me on that subject right now. If your Honor would prefer that we brief it, that is perfectly agreeable with me; whichever would be more convenient to your Honor.

The Court: I have heard the arguments generally. I just want to make sure there was nothing additional aside from the matters you have urged in connection with the matter now before the court, that there was anything additional that you had in mind to urge before the court made any formal order granting a motion to dismiss.

Mr. Carr: I could not say that, your Honor, now. I would like to review the whole situation before I say that. [517] We never went very fully into the question of the continuing conspiracy. That was mentioned, but we never argued it pointedly, and it was never brought to the attention of the court very pointedly. The contention was made, but I would like to present a formal argument on that question and possibly any other question that

might occur to us between now and the time of such argument. I would like to review this whole situation. I cannot do it in a moment.

The Court: I know that. What I had in mind particularly was, the court has now determined the question as a matter of law whether or not during the period of May 27, 1929, to October 10, 1939, the plaintiff knew or had cause to believe that its business had been damaged.

Mr. Carr: Yes.

The Court: The purpose of submitting that factual issue was to determine whether or not the motion to dismiss on the ground of the statute of limitations should be granted. I have determined that as a matter of law. Now, is there anything beyond that issue as to whether or not the plaintiff had knowledge or cause to believe within that stated period that its business had been damaged? Is there anything beyond that issue that would change the obvious result that the court should grant the motion to dismiss?

Mr. Carr: Yes, your Honor, if it was a continuing conspiracy you certainly should not grant the motion to dismiss. [518]

The Court: Just what do you mean by that?

Mr. Carr: Well, the law is, under the Kissel case, that where a conspiracy has been formed and a number of overt acts have continued, each overt act is a renewal of the conspiracy, and the statute does not begin to run until the termination of those so-called overt acts, and that is well established law, as we believe, and I want to present that. We

have never presented that very formally to your Honor. It was mentioned in our memos. We were relying more on this concealment provision and the question you presented here.

The Court: You mean there is another question as to whether or not the plaintiff had knowledge or cause to believe between 1939 and the time within which it would have had to file this suit?

Mr. Carr: No, your Honor, we believe the law is the conspiracy is what is known as a continuing conspiracy, and continued in force up until the termination of the last overt act, and that therefore the statute did not begin to run, irrespective of your Honor's dates indicated in your pre-trial order, until the termination of that last overt act. That is the Kissel case.

The Court: What do you contend would be the last overt act? You said 1937.

Mr. Carr: The Little Placer claim, when the claim for the Little Placer was terminated by order of this court sometime [519] after September, 1944.

The Court: I do not follow that. How did I terminate it? You mean this court?

Mr. Carr: Your Honor in your order directed that they dismiss their contest or application. They had a petition for mandamus, I believe it was, pending in the District Court of the District of Washington, to compel the Secretary of the Interior to issue them a lease upon the Little Placer. Now, that is all part of the conspiracy which we have charged here, and until the termination——

The Court: You are speaking of some provision of the equity decree?

Mr. Carr: Yes, your Honor, and until the termination of that overt act the statute did not begin to run as against the plaintiff in this action. We believe we can show many cases. As I say, we have not presented them. When this matter came along——

The Court: This is the first time you have made that specific point.

Mr. Carr: Oh, no, your Honor, we mentioned the fact of a continuing conspiracy.

The Court: I do not recall that my attention has ever been called before to the specific contention which you now make that irrespective of any of these other matters, that there is no question of the statute of limitations involved in [520] this case at all because of the fact that the last overt act was in 1944.

Mr. Carr: Yes, your Honor, this was a continuing conspiracy.

The Court: I know you have said that before, but I have never heard before the precise contention made that there is no question of the statute of limitations at all involved. Why did we have this question and spend all this time in the pre-trial discussing the form in which the special issue was to be presented to the jury, and there was no reference made, no argument to me that the statute was wholly inapplicable because of the fact that the statute did not begin to run until 1944?

Mr. Carr: No, but we did say when we presented our argument or memo in support of the instructions which we asked you to give the jury, we

referred to the contention that there was a continuing conspiracy, and that it was a question of law, your Honor, and not one for the jury. If you will examine that memo you will see such to be the fact. There can be more than one objection to the plea of the statute. Now, this one you have presented to the jury was a factual one. Your Honor fixed the dates, yourself, as to it, and which we, with all due respect, believed to be error, that that order was error in view of all the facts, and then in addition to that, even granting for the sake of argument—say [521] we were arguing on demurrer—even for the sake of argument——

The Court: Mr. Carr, I want to make myself clear on that: The dates do not make any difference to me, at all. If I were to decide right now the motion to dismiss on the ground of the statute of limitations, I would hold that at all times from 1925 on, whether it be a continuing conspiracy or whatever you call it, there was knowledge and good cause to believe, and therefore the action was not timely brought. Now, if you have an additional point that has nothing to do with knowledge or cause to believe that is based upon the ground that there is no necessity for the court and never was any necessity for the court to decide that question or to submit it to the jury because of the fact that the statute of limitations did not begin to run until the last overt act, which you claim was terminated by a court's order in the equity proceeding in 1944, that is a question we would have been better off to have heard and determined without going into all this

rigmarole of pre-trial conferences and working out a special issue and then submitting it to the jury. It was never presented to me in the form you are now presenting to me. What did we go through all of this for?

Mr. Carr: I do not know, your Honor.

The Court: You took part in it.

Mr. Carr: It is not a waiver of any of our rights because [522] if your Honor will be good enough to look at the memorandums we filed here, you will see we referred to the continuing conspiracy. We cited the Kissel case and one or two others.

The Court: But, Mr. Carr, you demanded a jury, if I remember rightly, to hear this factual question as to whether the cause of action was barred by the statute of limitations.

Mr. Carr: But not until after your Honor denied the motion and then said you would submit that factual question to the jury. Then when your Honor made the ruling, then we asked for a jury, but not before.

The Court: If I recall the argument, that was not any spark of genius on my part. As I recall, you argued as one of the grounds for denying the motion for summary judgment that there was a factual question that would have to be determined by a court or jury.

Mr. Carr: Yes, your Honor, there were two questions: The factual question and the question of the continuing conspiracy. Now, your Honor decided to place the factual one before the jury. You stated you would. But that was no abandon-

ment of our claim for a continuing conspiracy, and I would like very much, and we formally ask and request that your Honor set this matter for argument upon the continuing conspiracy question, and if you prefer that the matter be presented by briefs, we will be very glad to do so.

The Court: What have you got to say about this, Mr. Harrison? [523]

Mr. Harrison: If your Honor please, this question of continuing conspiracy was discussed by Mr. Carr at length upon the original argument of the motion to dismiss, and the claim was made then, as it is now, that because the conspiracy is alleged to have continued, therefore the statute never began to run presumably. Now, we relied in our briefs and in our argument upon the Foster & Kleiser case, which says very definitely in accordance with all the authorities that under the law of civil liability for violation of the Antitrust Law the material question is not whether the conspiracy is a continuing one, but when did the damage occur, and the statute begins to run immediately upon the occurrence of the damage, and that there can be recovered in the suit only the damages which have accrued legally as a result of the violation of the Sherman Antitrust Law within the statutory period before the action was taken; and in that Foster & Kleiser case the Circuit Court of Appeals for this district said that the Kissel case had no application whatsoever to a civil suit for damages. The Kissel case was a criminal case, and there was some talk there about a continuing conspiracy. As our Circuit Court of

Appeals pointed out, that has no application whatever to a civil case, and in a civil case the cause of action accrues at once, as soon as the damage occurs.

Now, the only damage that is alleged in the complaint by [524] the plaintiff, and it has been gone over many times, is the damage that resulted from the fraud order as a result of the cutting off of the subscriptions and the packaging business, and the damage which accrued in 1928 as a result of the price cuts. Those accrued at that time, and in the absence of some element of concealment, the statute would have run three years after the damage occurred.

Now, in the course of the oral argument upon the motion to dismiss, Mr. Carr at great length expatiated on the Kissel case, and upon the doctrine of continuing conspiracy. That was taken under submission by your Honor, and upon briefs filed, and as a result of your Honor's consideration of that and all the other questions, your Honor finally determined that there was one issue of fact which in your Honor's opinion ought to be decided before your Honor could finally pass upon the motion to dismiss, and not only was the matter of continuing conspiracy discussed at that time, but also this matter of the Little Placer, and your Honor indicated, if I remember correctly, very clearly that in your opinion the Little Placer claim had nothing to do with the cause of action of the plaintiff, because there was no allegation that the business of the plaintiff had been injured. The Little Placer claim

is set out at the end of the complaint without any relevance to the claim of damage to the plaintiff's business. The plaintiff's business, according to the allegations of the [525] complaint, had been destroyed long before anything of that kind occurred.

Now, the Little Placer claim furthermore is absolutely without merit for still another reason. The Little Placer claim is simply to the effect that there was a contest in the Land Office between the Pacific Coast Borax and the plaintiff here about who was entitled to a patent or a lease upon the Little Placer, and that was finally decided by the Department of the Interior that neither of them were and, of course, it is not a cause of action for a private litigant that the court has decided a matter or a tribunal has decided a matter adversely to a plaintiff, and upon that point it has been held by the Supreme Court of the United States in a decision that we cited, that where a person was injured by reason of the fact that unreasonable rates were charged by railroads pursuant to a conspiracy in violation of the Anti-trust Law, there could be no recovery because, as Judge Brandeis held, even if there had been a criminal violation of the law, the reasonableness of those rates was a matter confided to the Interstate Commerce Commission, and the fact that it had approved the rates was sufficient to preclude any private party from thereafter complaining of the decision of the tribunal.

Now, all that the plaintiff sets out is that the Department of the Interior, having the matter in charge, decided [526] the matter adversely to both parties, and we submit the tribunal being given the

power, the fact that it rendered its decision one way or the other cannot under any conceivable view of the law, produce any possible legal claim of damage resulting to the plaintiff. No damage is alleged in the first place; and in the second place, no damage could be alleged as a result of the decision of the Department of the Interior. The only business which the plaintiff had was, according to the allegations of the complaint, destroyed in 1925 and later in 1928 as a result of the two specific acts which the plaintiff accuses them of having done, to-wit, bringing about the fraud order and simultaneously cutting the price.

Now, then, in this Foster & Kleiser case I will read just two sentences which I think dispose of this Kissel case, and I read them before any argument:

"The statute, it is agreed, had run June 21, 1928. The trial court instructed the jury that if they should find the conspiracy continued up to June 21, 1928, and if they found that Foster & Kleiser performed acts in furtherance of such conspiracy on or since that date, they might in their verdict include all damages that were suffered by the appellee before June 21, 1928 that were the result of the operations of the appellant pursuant to the conspiracy. In support of this instruction the appellee cites *United States vs. Kissel*, where in a criminal prosecution brought against the defendants for a conspiracy punishable under the Sherman Antitrust Act, the Supreme Court held that the

applicable statute of limitations did not begin to run as long as the conspiracy continued, and that such conspiracy is a single offense.”

And then this court goes on to say:

“In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy but upon the injuries resulting therefrom. The fact that there may be a criminal conspiracy does not give the plaintiff an action for damages under section 7 of the Antitrust Law,” citing decisions. “The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable. The cause of action arises from the damage sustained. The statute of limitations begins to run at that time. In *Bluefield vs. United Fruit*, the plaintiffs brought an action under the Sherman Antitrust Law to recover damages for injuries alleged to have been sustained in consequence of defendants’ creating an itself a monopoly in the banana business. It was there held that the statute of limitations began to run when the damage occurred.”

I am repeating what I said before, your Honor.

The Court: It now occurs to me. I must agree with Mr. [528] Carr to this extent: A great deal of water has gone over the judicial dam since I heard the arguments on the motion to dismiss. I recall now, after hearing what both of you have

said, these matters were discussed on the argument with respect to the motion to dismiss, and I think I have those before me. I will look them over again.

Mr. Carr: I ask your Honor that we be given an opportunity to submit additional authorities to those we presented before, because we have them, and there are cases.

The Court: I would not deny you that right, of course.

Mr. Carr: Any way your Honor wishes.

The Court: The record shows the motions to dismiss and the briefs that were filed at that time. Now, if you want to add to them, how much time would you want to add additional authorities?

Mr. Carr: Ten days.

The Court: Would you want to reply?

Mr. Harrison: Yes, your Honor.

Mr. Carr: May I have two weeks, your Honor? I have another case I have got to go into right away.

The Court: Say two weeks, fifteen days, and would you like a like period in which to reply, Mr. Harrison?

Mr. Harrison: Yes, your Honor.

The Court: Fifteen days to reply, and then the motions to dismiss will be submitted. [529]

Mr. Harrison: Before the motions are submitted, if the Court please, I have only this to say: The motions are based, so far as this particular branch of the case is concerned, upon the complaint, but we also introduced on behalf of our motion at the time it was originally heard certain affidavits,

so that if it were considered as a speaking motion they could be considered. Now, at the present time we should like to offer as additional documents in support of our motion certified copies showing the action taken by the Department of the Interior with respect to the Little Placer claim. Those are certified copies of judgment, July 22, 1927, and also order denying petition for rehearing on February 24, 1947, and we ask that those be considered as part of the motion, although I do not believe, your Honor, he will have to consider those.

Mr. Carr: What is that last date?

(Dates read.)

The Court: Very well. Both of those documents will be considered as offered in support of the motion. Then the motions to dismiss will be submitted on 15 and 15.

Mr. Carr: Yes, your Honor. [530]

Certificate of Reporter

We, Official Reporters and Official Reporters protem, certify that the foregoing transcript of 530 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ J. J. SWEENEY,

/s/ F. J. SHERRY.

[Endorsed]: No. 11766. United States Circuit Court of Appeals for the Ninth Circuit. Burnham Chemical Company, a corporation, Appellant, vs. Borax Consolidated, Ltd., a corporation, Pacific Coast Borax Company, a corporation, United States Borax Company, a corporation and American Potash & Chemical Corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed Octobed 20, 1947.

/s PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 11,766

BURNHAM CHEMICAL COMPANY,

Appellant,

vs.

BORAX CONSOLIDATED, LTD., et al.,

Appellees.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF PARTS
OF RECORD TO BE PRINTED

Appellant adopts as the statement of points upon which it intends to rely on this appeal the state-

ment of points filed in the above entitled action in the United States District Court for the Northern District of California, Southern Division, upon the 2nd day of August, 1947, and in addition thereto designates the following point:

7. The District Court erred in refusing to allow appellant to read to the jury the complaint on file in this action.

And Appellant Designates That there be printed the whole of the record now on file herein, save and except the original exhibits which, provided by order of this Court made herein upon the 27th day of October, 1947, might be considered in their original form and without reproduction.

/s/ STERLING CARR,

Attorney for Appellant.

Dated: November 18, 1947.

Received copy of the within this day of Nov., 1947.

BROBECK, PHLEGER &

HARRISON,

NEWLIN & ASHBURN,

Attorneys for Appellees, Borax Consolidated, Ltd.,
Pacific Coast Borax Company, and United
States Borax Company.

/s/ CHARLES A. BEARDSLEY,

Attorneys for Appellee American Potash & Chemical Corporation.

[Title of Circuit Court of Appeals and Cause.]

PETITION FOR ORDER RELIEVING APPELLANT FROM PRINTING EXHIBITS AND ALSO EXTENDING TIME FOR PAYMENT OF PRINTING FEES DUE CLERK OF THE ABOVE COURT

Now comes appellant above named, and by Sterling Carr, its attorney, respectfully states:

That the Record on Appeal in the above entitled case was docketed upon the 20th day of October, 1947. That such record consists of four volumes of Reporter's and Clerk's Transcripts and a large number of original exhibits introduced upon the trial of the above entitled cause in the District Court. That the estimated cost of printing the Record on Appeal, excluding such exhibits, is the sum of Sixteen Hundred and Ninety Dollars (\$1690.00); that said original exhibits are numerous in number and exceedingly long and it would be very expensive to print the same. That, in addition, the desired and important parts of such were in many instances read to the Jury and are set forth in the said Reporter's Transcript. Both counsel for appellees and counsel for appellant read to the Jury from the various exhibits, as introduced, the parts desired to be called to the particular attention of the Jury so the same appear as aforesaid in said Reporter's Transcript, and such portion will be printed in the Transcript to be used on this appeal and will be readily available upon the hearing of such appeal.

That at present the office of said appellant is in Reno, Nevada, where the President of said appellant resides; said appellant is not now engaged in active business and that it will be necessary for said President of appellant to collect from various parties the said Clerk's costs for the printing of said Transcript, and by reason thereof appellant requests to and including the 15th day of November, 1947 within which to make said payment of \$1690.00 to said Clerk of the above entitled Court.

Wherefore, petitioner respectfully prays that this Honorable Court make its order granting the two requests of appellant above set forth in this petition.

Respectfully submitted,

BURNHAM CHEMICAL
COMPANY,

By /s/ STERLING CARR,
Its Attorney.

[Title of Circuit Court of Appeals and Cause.]

Northern District of California,
State of California,
City and County of San Francisco—ss.

Sterling Carr, being first duly sworn, deposes and says:

That he is the attorney in the above entitled matter; that he has read the foregoing petition and

knows of his own knowledge that the facts therein stated are true and correct.

/s/ STERLING CARR,

Subscribed and sworn to before me this 24th day of October, 1947.

[Seal] /s/ LAURA E. HUGHES,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 4, 1950.

ORDER

Upon reading the foregoing petition and Good Cause Appearing therefor, It Is Hereby Ordered:

1. That appellant be relieved from having the exhibits referred to in said petition printed and reproduced in the Transcript, and that said exhibits may be considered in their original form without reproduction; and

2. That appellant may have, and it is hereby granted, to and including the 15th day of November, 1947, within which to pay to the Clerk of the above entitled Court the estimated costs of printing said Transcript referred to in said petition and amounting to the sum of Sixteen Hundred and Ninety Dollars (\$1690.00).

Dated: October 27, 1947.

/s/ WILLIAM DENMAN,

United States Circuit Judge.

[Endorsed]: Filed Oct. 27, 1947.